92-949

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.)
JOSE A. PURCELL

Petitioners

versus

THE COMMONWEALTH OF PUERTO RICO
HON. MILAGROS RIVERA GUADARRAMA;
HON. LUIS SAAVEDRA SERRANO;
HON. CARLOS RIVERA MARTINEZ

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
COMMONWEALTH OF PUERTO RICO

APPENDIX TO PETITION FOR CERTIORARI

Juan R. Marchand-Quintero
Counsel for Petitioners
P.O. Box 4227
San Juan, P.R. 00902-4227
(809) 721-2495

IN THE SUPREME COURT OF PUERTO RICO

El Vocero de P. R. (Caribbean Int. News Corp.) et al.

Appellants

v.

The Commonwealth of P. R. et al.

Appellees

Opinion of the Court issued by MRS. Associate Justice NAVEIRA DE RODON.

San Juan, Puerto Rico, July 8, 1992

On this occasion it corresponds to us to decide, on first instance, whether that part of Rule 23 (c) of Criminal Procedure, 34 L.P.R.A. Ap. II, which establishes that the preliminary hearings shall be conducted in private unless the accused requests, at the

commencement thereof, that it be public, is unconstitutional because it denies the access of the public and of the press at that stage of the criminal proceedings, in contravention of the freedom of the press and of speech guaranteed by the First Amendment of the Federal Constitution, applicable to the states through the Fourteenth Amendment, as this right has been interpreted in Press Enterprise v. Superior Court, 478 U.S. 1 (1986) (henceforth) Press Enterprise II.

I. FACTS

The facts that nourish the controversy of law herein presented are relatively simple. Let us see.

In the instant case the facts are not in controversy. On October 31, 1989, Mr. José A. Ahmed Purcell, a co-

plaintiff and reporter for El Vocero de Puerto Rico newspaper (hereinafter El Vocero), requested, in writing, from the District Judges, codefendants herein, the Hon. Milagros Rivera Guadarrama, Hon. Luis Saavedra Serrano and Hon. Carlos Rivera Martínez, that they allow him to be present at the preliminary hearing proceedings that, under the protection of Rule 23 of Criminal Procedure, supra, they would be presiding that day. In its absence, and if the petition to attend the preliminary hearings were denied, the reporter requested that the proceedings be recorded in order to make a record to which he would be permitted access afterwards.[1]

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[1] Mister Purcell Ahmed presented to each codefendant judge a copy of the document whose content we are transcribing herein:

The petition was denied in all its parts.

This prompted El Vocero and

"REQUEST OF ACCESS AND TO BE PRESENT AT THE PRELIMINARY HEARING CONDUCTED UNDER RULE 23 OF CRIMINAL PROCEDURE.

TO: HON. DISTRICT JUDGE

I am José A. Purcell Ahmed, a full time reporter for El Vocero de Puerto Rico newspaper. I hereby respectfully request from the Honorable Court that in said capacity that (sic) I be allowed access and to remain in the courtroom in order to be present and listen to the Preliminary Hearing proceedings soon to begin before you, and to any other that might be conducted today, according to the provisions of Rule 23 of Criminal Procedure.

In case that our request be denied, it is hereby requested that the proceedings to be conducted be recorded and that a record be made to which we may have access.

I understand that preliminary hearings should be open to the public and to the press because these proceedings have a presumption of being public (sic) according to the freedom of the press guaranteed by the First Amendment of the Constitution of the United States.

Respectfully Submitted."

reporter Purcell to present a declaratory judgement complaint and injunction before the Superior Court so that it be ruled unconstitutional that part of Rule 23 (c) of Criminal Procedure that provides for the holding in private of the preliminary hearing unless the accused, at the beginning thereof, requests that the hearing be public, and that a cease and desist order be issued addressed against any judge with the purpose if implementing that decision. Their petition was based on the provisions of the First Amendment of the American federal Constitution , applicable to the states through the Fourteenth Amendment, having to do with freedom of the press and of speech rights.

At instance the plaintiffs founded their argument on the aforementioned freedom of the press and of

speech rights, as conditioned by the right to a fair and impartial trial according to what was established by the Sixth Amendment to the federal Constitution and in the case of Press Enterprise II, resolved by the federal Supreme Court. They alleged that said case establishes that the First Amendment guarantees to the public and to the press access to the preliminary hearings held in Puerto Rico.

On its part, the State requested the dismissal of the complaint. It expounded that the Press Enterprise II standard of access is not applicable to Puerto Rico because it is one that is restricted and distinguishable. It argued that said standard is applicable only to preliminary hearings as conducted in the state of California, where, differently from Puerto

Rico, there is an openness tradition. It argued, besides, that hearings held in absence of the general public and of the press guarantee a fair and impartial trial and that the secretiveness of the hearing also protects the right to privacy of the accused. It also argued that the State has a compelling interest in providing said protection, which justifies closure as a general rule.

On January 29 of 1990 the court of instance issued a judgement by means of which it dismissed the complaint and imposed costs to plaintiffs. In its judgment, it resolved that the right to privacy and the right of every accused to be guaranteed a fair and impartial trial have priority over the limited right of access of the press and of the public to preliminary hearing proceedings such as

they are conducted in Puerto Rico. Thus it preserved the private nature of the preliminary hearing.

In disagreement with that opinion, plaintiffs appealed. They asserted that the court of instance erred when it resolved that "...they are not assisted by any right under the federal First Amendment to be present at the preliminary hearings held in our jurisdiction under the protection of Rule 23 of Criminal Procedure, contrary to what was resolved in Press Enterprise II".

II. THE JURISPRUDENCE OF THE FEDERAL SUPREME COURT PRIOR TO PRESS ENTERPRISE II.

In order to be able to determine the real scope of Press Enterprise II and its possible application to the instant

situation, it is necessary that we analyze the trajectory of what the Supreme Court of the United States has resolved in relation with the right of the public and of the press of limited access to a criminal trial.

In 1979 the Court had the first opportunity of encountering the problem in Gannett Co. Inc. v. De Pasquale, 443 U.S. 368 (1979) (henceforth Gannett). In a case for murder in the second degree, robbery and grand larceny, a suppression of evidence hearing was requested after the arraignment, concerning an allegedly involuntary confession and certain physical evidence. The accused requested the exclusion of the public and of the press alleging that the adverse publicity that they were getting was jeopardizing their ability to have a fair and impartial

trial. The district attorney did not oppose the motion and the court granted it. Gannett Co., an enterprise which published two newspapers in Rochester, New York, requested that said order be set aside and that it be given access to the transcript of the hearing. The Court of Appeal of New York resolved that under New York law criminal trials are presumptively open to the public, including the press, but that in this case the presumption had been rebutted because of the danger it posed to the defendants' ability to receive a fair trial.

The Court refused to recognize that under the Sixth Amendment there existed a right of access to a criminal trial on the part of the public, and to consider, specifically, whether under the First and Fourteenth Amendments, said right existed.

By using the analysis of experience and logic analysis it concluded that pretrial proceedings, precisely because of the concern for a fair trial, had never been characterized by the same degree of openness as were actual trials and that historically these proceedings were not open. The federal Supreme Court then proceeded to determine that the Constitution of the United States did not give the petitioners an affirmative right of access to these pretrial proceedings, when all the participants in the suit (the defendants, the prosector and the judge)were in agreement that it should remain closed in order to protect the right to a fair trial. [2]

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[2] The majority of the Court understood that what was at issue was whether the public had a constitutional right to attend a proceeding accessory to

One year later, the case of Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), (hereinafter Richmond), came before the Court's attention. In this case the Supreme Court resolved for the first time that under the protection of the First and Fourteenth Amendments, the general public and the press had a limited right of access to a criminal trial.

This had to do with a murder case in which the defendant requested that the trial be closed to the public. The prosecutor did not object, and the judge ,

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the trial in a criminal proceeding, even though the accused as well as the prosecutor and the judge are in agreement that the proceedings must be closed in order to guarantee a fair trial.

At present, only two of the judges who assented with the majority's opinion, Rehnquist and Stevens, and two dissenting judges, White and Blackmun, are still in the Supreme Court.

basing himself on a statute that allowed him to discretionarily exclude from the trial any person who might prevent the trial from being fair, agreed.

Although the judges were not able to come into agreement to issue an opinion, seven of them[3] agreed in that the order of exclusion violated the right of limited access of the public and of the press to a criminal trial, as it is guaranteed by the First and Fourteenth Amendments of the United States Constitution. [4]

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[3] The Justices were Burger, White, Stevens, Brennan, Marshall, Stewart and Blackmun. Three of the judges, White, Stevens and Blackmun, are still Supreme Court Justices.

[4] In a concurring opinion issued by Justice White, he stressed that this case would not have been necessary if in Gannett the Court had decided that the Sixth Amendment forbids that the public be excluded from a criminal trial. In a concurring opinion, Justice Stevens stated that the total absence of a record

The judges also employed the analysis of experience and logic analysis to conclude that under the protection of the First and Fourteenth Amendments, the public has a limited right of access to a criminal trial and that in the absence of a primordial interest based on a determination of facts, the criminal case has to be open to the public.

In 1982 the Court again had before it the constitutional issue of access of the public to a criminal trial. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), (henceforth Globe). This time it had to do with determining the constitutionality of a Massachusetts state statute that provided for the exclusion of the general public from

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justifying the closure order violated the First Amendment.

trials having to do with certain sexual offenses when the victim was under eighteen (18) years of age. The Supreme Court of Massachusetts resolved that the statute, under whatever circumstances, excluded the press and the public during the testimony of victims who were juveniles. The federal Supreme Court, employing the analysis of experience and logic analysis, that criminal trials have been historically open to the press and to the public and that this access has played a particularly significant role in their functioning, concluded that the Massachusetts law was unconstitutional. It stated that this right of access to a criminal trial on the part of the press and of the public was not absolute ; they can only be excluded on limited occasions. In order to be able to exclude them, the

State has to show that there exists a compelling governmental interest and that it is one narrowly tailored to serve that interest. [5]

Justice O'Connor concurred with the outcome, specifically stating on the record that she did not interpret neither the Globe nor the Richmond decisions as ones having effect beyond the context of criminal trials as such.

Two years later the Court considered two cases having to do with the constitutional right of access of the public and of the press to a criminal trial: Press Enterprise co. v. Superior Court, 464 U.S. 501 (1984), (henceforth

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[5] The opinion of the Court was issued by Justice Brennan, who was joined by Justices White, Marshall, Blackmun and Powell. Of these, only Justices White and Blackmun are members of the Court at present.

Press Enterprise I) and Waller v. Georgia, 467 U.S. 539 (1984), (henceforth Waller).

Press Enterprise I dealt with the voir dire proceedings. In a criminal trial for the rape and murder of a teenage girl, members of the press requested that the voir dire be open to the public and the press. The State opposed alleging that if the press were present, the responses from the jurors would lack the candor necessary to assure a fair trial. The judge agreed and allowed the press to be present only during the general voir dire, not during the individual one. Once the jury was empaneled, the petitioner requested the transcript of all the voir dire proceedings. The accused as well as the prosecutor argued that releasing it would violate the jurors' right to

privacy. The Supreme Court of California upheld both the order to close the voir dire, as well as the one that denied release of the transcript.

Again employing the experience and logic analysis, the federal Supreme Court concluded that the guarantees of an open criminal trial covered voir dire proceedings. It asserted that the presumption of openness of a criminal trial can only be overcome by a compelling interest of the State, based on a determinations of fact that closure is necessary in order to preserve a higher value and that it be narrowly tailored to serve that compelling interest.[6]

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[6] The opinion of the Court was issued by former Chief Justice Burger, he was joined by Justices Brennan, White, Blackmun, Rehnquist, Stevens and O'Connor. Of these five, White, Blackmun, Rehnquist, Stevens and O'Connor are present members

In Waller the Court again encountered an evidence suppression hearing after the indictment. On this occasion the state court ordered, notwithstanding the objections of the accused, that the evidence suppression hearing be held in private. The Court determined that the right to a public trial protected by the Sixth and Fourteenth Amendments of the federal Constitution applies to an evidence suppression hearing and that this right was violated since closure of all the suppression hearing was not justified.

The Waller case had to do with the violation of a statute about corruption

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of the Court.

In relation to this opinion, it is interesting to point out that Justice Rehnquist, who had dissented in the Richmond and Globe cases, joined the majority.

prohibition and other laws prohibiting gambling in Georgia. The State obtained certain evidence by means of wiretapping. It requested closure of the suppression hearing on the grounds that under the wiretapping laws of Georgia, the divulging of any information obtained by means of an order for wiretapping that was not necessary and essential, would make the information inadmissible as evidence. The defendants opposed.

The Court indicated that it had never considered whether the right of the accused under the Sixth Amendment extended beyond the actual proof at trial, and if it did, up to where. As to the qualified right of the public and of the press, under the First Amendment, to attend a criminal trial, it stated that it had been recognized in the cases of Globe and

Richmond, and that in Press Enterprise I, this right had been extended to voir dire proceedings. It also noted that in Gannett, a majority of the judges concluded that it also applied to an evidence suppression hearing.

The Court found that the suppression hearing resembles a non-jury trial where the witnesses testify under oath, the attorneys argue their positions and the outcome depends on the determination of facts that the Court makes. It stated that in the case of the evidence suppression hearing, the need that it be open is great, since, frequently, the basis for questioning the admissibility of the evidence is the improper behavior of the policeman or of the prosecutor. Therefore, it resolved that in order to uphold an order entirely closing a

suppression hearing to the public and to the press, it is necessary that there be a pressing interest that will be prejudiced; that closure not be broader than what is absolutely necessary to protect that interest; that the Court has considered other reasonable alternatives in stead of closure; and that it has made determinations of fact that support closure.[7]

The cases of Gannett, Richmond, Globe, Press Enterprise I and Waller, which deal with proceedings held after the filing of an indictment, show with total clarity that, as to the criminal trial, that is, the adjudicative stage, the Supreme Court of the United States has consistently ruled that the press and the

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[7] Justice Powell wrote the unanimous Court opinion.

public in general are assisted by a qualified right of access under the protection of the First and Fourteenth Amendments; and that the accused has the right to a public trial protected by the Sixth and Fourteenth Amendments, but that this right does not imply that he has a right, similarly, to the trial being closed if he so requests. The Court has recognized the existence of a presumption in favor of openness of the criminal trial and that in order to controvert this presumption, that the existence of a compelling interest must be shown; that closure is necessary for the protection of said interest; that the court has considered other reasonable alternatives; and that determinations have been made that support closure.

In relation to voir dire and to

evidence suppression hearings, the Court estimated that those proceedings, held after the filing of the indictment, were part of the criminal trial, that is, part of the adjudicative stage, and that experience and logic support concluding that the openness presumption is applicable to them.

To summarize, all of these cases deal with proceedings held after the filing of an indictment, and in all of them the Court employed the experience and logic analysis. It is important to bear in mind that none of them has to do with some proceeding that is conducted at the judicial investigative stage, that is, prior to the filing of the indictment. In its analysis the Court was specially careful in pointing out that it was referring to the criminal trial and to

proceedings that by their nature, by being after the filing of the indictment, are considered part of the criminal trial, that is, part of the adjudicative stage. It is under the light of this jurisprudential trajectory that we must analyze the scope stated in the Press Enterprise II case.

III. THE CASE OF PRESS ENTERPRISE II AND PRELIMINARY HEARINGS AS CONDUCTED IN CALIFORNIA

In 1986 the Supreme Court of the United States confronted an issue similar to the one that occupies us at this moment. In Press Enterprise II it had to decide whether the petitioner there had a right, under the First Amendment of the federal Constitution, of access to the transcript of a preliminary hearing. The

hearing was held in the case of a male nurse accused of killing twelve patients by administering to them massive doses of the cardiac drug known as lidocaine. Upon the commencement of the preliminary hearing against him, the accused requested the exclusion of the public from the proceedings, under the protection of Section 868 of the California Penal Code.[8]

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[8] Section 868 of the California Penal Code , at the moment that the hearing against Mr. Díaz was going to be held, provided the following:

"The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the witness is testifying, the defendant and his or her counsel, the

There was no opposition to his request and the magistrate granted it because he understood that holding the hearing in private was necessary, since the case attracted much publicity at the national level and the information media might report just one side of the story. The preliminary hearing lasted forty-one (41) days. Upon its conclusion, Press Enterprise requested form the court that the contents of the transcript of the

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officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 687 of the Penal Code." (Supplied emphasis)

proceedings be released. The magistrate denied the petition and sealed the record. Afterwards, the State of California moved in Superior Court and requested that the contents of the transcript of the preliminary hearing be released to the public. Press Enterprise joined this petition. Díaz opposed it and alleged that releasing the transcript would result in prejudicial pretrial publicity. The Superior Court found that there was a "reasonable likelihood that release of all or any part of the contents of the transcript might prejudice the right of the defendant to a fair and impartial trial."

Press Enterprise resorted to the State Court of Appeal, which denied the writ. In the same manner, the Supreme Court of California denied the requested

decree, and held that, under the First Amendment of the federal Constitution, there is not a right of access to the preliminary hearings. Upon not finding a right of access under the First Amendment, it went on to consider the circumstances in which it was justified to exclude the public from a preliminary hearing according to the provisions of the Penal Code. It concluded that, under Section 868 of the Code, if the defendant established a "reasonable likelihood of substantial prejudice", the burden of proof would shift to the State or to the communication media so that they would show , by a preponderance of the evidence, that no such reasonable possibility of prejudice exists.

The federal Supreme Court agreed to review the decision granting a certiorari

and reversed the Supreme Court of California. In its opinion, it identified the controversy as referring to the right of the public under the First Amendment. It highlighted the conclusion of the California Supreme Court that the First Amendment was not implicated in this case because it was not a criminal trial, but a preliminary hearing. It asserted that the discussion concerning the First Amendment cannot be resolved solely on the basis of not giving the proceedings the labeling of "trial", above all when the preliminary hearing is conducted in a manner much like a trial on its merits.

In its analysis the Supreme Court resorted to the two complementary considerations previously employed in cases having to do with claims for access to criminal proceedings under the First

Amendment, experience and logic. In the first place, it considered the proceeding's history of being open to the press and to the public in general, "since a tradition of accessibility implies the favorable judgement of experiences". In the second place, whether public access plays a significant role in the functioning of the particular process concerned.

With these principles in mind, it proceeded to analyze the controversy of the Press Enterprise II case. As to the first consideration, that of experience, which is no other thing than a historical analysis, it examined the preliminary hearing proceeding similar to that as conducted in California. In relation to it, it pointed out the following:

"First, there has been a tradition of

accessibility to preliminary hearings of the type conducted in California. Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public. Long ago in the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable cause hearing was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens. From Burr until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court. As we noted in Gannett, several states following the original New York Field Code of Criminal Procedure published in 1850 have allowed preliminary hearings to be closed on the motion of the accused. But even in these states the proceedings are presumptively open to the public and are closed only for cause shown. Open preliminary hearings, therefore, have been accorded "the favorable judgement of experience.'" Press Enterprise II, supra, pp. 11-12. (Cites omitted).

The second question is whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role int eh actual

functioning of the process. We have already determined in Richmond, Globe, and Press-Enterprise I that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion.

In California, to bring a felon to trial, the prosecutor has a choice of securing a grand jury indictment or a finding of probable cause following a preliminary hearing. Even when the accused has been indicted by a grand jury, however, he has an absolute right to an elaborate preliminary hearing before a neutral magistrate. The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence and to exclude illegally obtained evidence. California Penal Code, Ann., Sects. 859-866. If the magistrate determines that probable cause exits, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases.

It is true that unlike a criminal trial, the California preliminary hearing cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury. But these features, standing alone, do not make public access any less

essential to the proper functioning of the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding. As stated by the California Supreme Court...the preliminary hearing in many cases provides 'the sole occasion for public observation of the criminal justice system'.

Similarly, the absence of a jury, long recognized as 'an estimable safeguard against the corrupt, or overzealous prosecutor and against the compliant, biased or eccentric judge', makes the importance of public access to a preliminary hearing more significant. 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing'." (Some cites omitted and supplied emphasis).

Once the aforementioned was established, the federal Supreme Court concluded that under the provisions of the First Amendment, the qualified First Amendment right of access applies to preliminary hearings similar to the ones

conducted in California.

Once resolved that the public had a right to be present at the preliminary hearing, it established that this proceeding could not be held in private unless on the record findings were made showing that "secretiveness was essential to preserve higher values and that it was specifically tailored to serve that interest". Press-Enterprise, supra, p. 13.

It rejected the analysis performed by the Supreme Court of California that stated that the accused, in order to prevail in his petition that the hearing be private, had to show a "reasonable likelihood of substantial prejudice". It pointed out that if the right being claimed is that of the defendant's for a fair trial, the preliminary hearing should

be private only when specific findings be made showing that, first, a "substantial probability" exists that the right of the defendant to a fair trial will be prejudiced by publicity and that closure will prevent that prejudice; and second, that no "reasonable alternatives" to closure exist that will adequately protect the right of the accused to a fair trial. The Supreme Court indicated that the "reasonable possibility" test of the California Supreme Court placed a lesser burden on the defendant than the "substantial probability" required when the First Amendment is at stake. Due to these reasons it reversed the decision of the California Supreme Court.

As it may be noticed, the federal Supreme Court, in Press Enterprise II, limited itself to resolve that the

standards about the qualified right of access of the press and of the public to a criminal trial, which is protected by the First and Fourteenth Amendments, were applicable to the California preliminary hearing which "functions much like a full-scale hearing", that is, since these almost constitute a "mini-trial".

It is with this frame of reference that we should analyze the scope of the Press-Enterprise II decision of the Supreme Court of the United States, conducting a detailed comparative analysis between the California preliminary hearing and ours. If the result of this analysis were that our preliminary hearing is an extensive and elaborate one, sufficiently alike to a trial on the merits as the California one, the precedent set in Press-Enterprise II would be fully

applicable. On the other hand, if we are before a preliminary hearing which, by its nature and functioning, resembles a hearing of the judicial investigative type, then Press Enterprise II, would not be applicable to it.

Nevertheless, this does not solve the problem. If Press-Enterprise II is not applicable, we must analyze our preliminary hearing in the light of experience and logic, taking into consideration the place where it is held and the proceedings concerned, in order to determine if, even when not being a trial-like proceeding, the press and the public are assisted by a qualified right of access under the First and Fourteenth Amendments. It is when this analysis has been completed that we shall be able to assess the constitutionality of Rule 23 of

Criminal Procedure in the light of these constitutional provisions.

Now then, if we conclude that Rule 23 does not violate the First Amendment, then we have to go into analyzing whether "our Constitution, which recognizes and grants some fundamental rights with an ampler and more protective view", in the balance of interests, grants to the press and the public in general this qualified right of access to preliminary hearings. López Vives v. Policia de P. R., 118 D.P.R. 219, 226-227 (1987)

IV. THE PRELIMINARY HEARING IN CALIFORNIA

The California preliminary hearing appears included in Sections 858 to 883, Chapter Seven (7) of the Penal Code of said state. California Penal Code Annotated, Sec. 858-883. The preliminary

hearing mechanism that exists in California was adopted in 1872. Since then, up to the present, provision was made to hold the preliminary hearing in public except when, in order to defend and preserve the right of the defendant to a fair and impartial trial, the magistrate determines that it should be closed to the public. This aspect is covered by Section 868 of the California Penal Code, which we shall later examine in detail.

An examination of the California Penal Code provisions concerning the preliminary hearings conducted in that state,convinces us that it certainly is a matter of an elaborate proceeding, as pointed out by the federal Supreme Court in Press-Enterprise II. There is an entire chapter in the California Penal Code dealing with diverse aspects of what

may transpire in the preliminary hearing. There are certain sections in that chapter that are indispensable for the solution of the instant controversy. These provide the necessary tools for the preliminary hearing mechanism to acquire procedural life. Let us examine them in detail.

In California, every person accused of an offense for which the superior court has jurisdiction, must be taken without delay before a magistrate. The magistrate will give him copy of the complaint and inform him about his right to be assisted by counsel. He may retain one of his choosing and, if he lacks the necessary financial means, the State will provide one for him. Once the attorney appears or when it is determined that the accused can appear pro se, the prosecutor will hand him or will place at his disposal a copy

of the offenses and arrests report prepared by the police. (Section 859) If it is a matter of a felony and the accused does not plead guilty, the magistrate, when he appears for arraignment, will set a date for a preliminary hearing of the case and will allow the prosecutor and the defense for the defendant no less than two (2) days to prepare for the hearing. (Section 859 b). At the request of the prosecutor or of the defense, the magistrate will issue summons for the appearance of the witnesses that are within the state. It has been established that the prosecutor as well as the defense have the right to have the preliminary hearing held as soon as possible and to have it held within the following ten (10) court days as of the arraignment or as of when the plea is made, unless both waive

that right or there is just cause to extend it. If the accused is under custody, the magistrate must dismiss the complaint if the preliminary hearing is set, or continued, after the ten (10) days previously mentioned have elapsed. The dismissal will not be justified if the defendant personally waives his right to have the preliminary hearing held within the following ten (10) days or if the prosecutor shows just cause for continuing the proceeding once said term has elapsed. (Section 859b).'

' After the Press-Enterprise opinion in 1987, a paragraph was added to this section in order to establish, without it being limitative, those instances which may considered "just cause". It also was added that any extension under those circumstances should be limited to a maximum of three (3) additional court days. In the same manner, it was established that if the preliminary hearing is initiated or is extended beyond the ten (10) day period,

It has also been provided that the preliminary hearing must take place in one single session or if not, the complaint[10] has to be dismissed. The dismissal will

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the accused must be released unless: (1) he himself requests the setting or continuation of the preliminary hearing once the ten (10) day period has elapsed; (2) he is accused of a felony that entails a death sentence and the proof is evident and overwhelming; (3) a witness necessary for the preliminary hearing is not available due to acts of the defendant; (4) the defense attorney becomes ill; (5) the attorney becomes unexpectedly involved in a jury trial; (6) unforeseeable conflicts of interests that require the designation of a new attorney. It also was included that if the preliminary hearing is set or extended for a period greater than sixty (60) days, tallied as of the complaint or the plea, the magistrate shall dismiss the complaint unless the accused personally waives his right to having the hearing held within the sixty (60) day period. In 1990 a section was added, numbered 859.1, which due to its relationship to Section 868, we shall discuss later.

[10] In the California code, the document containing the charges is called "complaint", inclusively after the arraignment.

not be justified when it is the magistrate who continues it, but in order to do so he must show just cause by means of an affidavit. The continuance must not exceed ten (10) court days unless any of the following situations arises: (1) the defendant personally waives his right to a continuous preliminary hearing; or (2) the prosecutor shows just cause for a continuance in excess of ten (10) days. If the magistrate postpones the hearing for a period exceeding ten (10) and the defendant is under custody, he must be released. The preliminary hearing must not be postponed for more than sixty (60) days, tallied as of the date in which the continuance was granted, unless the defendant requests it through a motion or consents to it

(Section 861).

Upon the commencement of the preliminary hearing, the defendant has the right to have the magistrate read to him the depositions of the witnesses interviewed during the investigation (Section 864). The witnesses presented at the hearing must be examined in the presence of the defendant and may be cross-examined for his benefit (Section 865). Once the presentation of the witnesses for the prosecution ends, all the witnesses presented by the defense must be sworn and examined. Now then, by petition from the prosecutor the magistrate will require a proffer of proof in relation to the testimony expected from the witness. The magistrate will not allow the testimony of any defense witness unless the proffer of proof reveals , to the satisfaction of the magistrate and in

accordance to his better judgment, that if believed, the testimony will have a reasonable probability of establishing an affirmative defense, denying some element of the charged offense or of impeaching the testimony of a prosecution witness or the declaration of a person about which a prosecution witness has testified. This is in tune with the purpose of the California preliminary hearing of determining if probable cause exists to believe that the defendant committed a felony. It is pointed out that the hearing must not be used with discovery purposes; neither with the purpose of compelling or authorizing the taking of depositions from witnesses (Section 866). At the time when Press-Enterprise II was resolved this section provided that once the presentation of the prosecution

witnesses was completed, the defense witnesses should be sworn and examined.[11]

In California, at the time when Press-Enterprise II was resolved, the norm that the Rules of Evidence applied to the preliminary hearing was in effect.[12] Thus, in the case of McDaniel v. Superior Court for the County of San Diego, 126 Cal. Rptr. 136, 137 (1976), the following was resolved:

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[11] In this respect, see Jones v. Superior Court of San Bernardino County, 94 Cal. Rptr. 289 (1971). Section 866 of the California Penal Code was amended in 1990 in order to add everything concerning the proffer of proof, the purpose of the preliminary hearing, and about the depositions from witnesses.

[12] At present the California Penal Code, in the chapter on the preliminary hearing, only excludes from the application of said proceeding(sic), by means of an express provision to that effect, the Best Evidence Rule. Thus, Section 872.5 provides that the Best Evidence Rule will not apply to preliminary hearings.

> "Subject to the court's inherent power to exert control in relation to the introduction of evidence and the rules governing the admissibility of evidence, Jennings[13] compels the court to allow the defense to present its case and to interview witnesses at the preliminary hearing."

During the course of the preliminary hearing, the accused shall not be examined unless he is represented by counsel or unless he waives this right after he has been advised of it at the hearing (Section 866.5). As to the witnesses, it has been established that while any of them is undergoing examination, the magistrate shall be able, on a motion from any of the parties, to exclude any actual or

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[13] Referring to the case of Jennings v. Superior Court of Contra Costa County, 59 Cal. Rptr. 440 (1967). In our jurisdiction, the matter of whether the Rules of Evidence apply or not to the preliminary hearing proceeding, has been left in "quaere". See Pueblo v. Esteves Rosado, 110 D.P.R. 334 (1980).

potential witness that has not been examined. He will order the witnesses not to converse among themselves and, if possible, to stay apart one from the other until all have been examined. Certain persons, like the investigating officer, any defense investigator or the officers in charge of the custody of the persons brought before the magistrate, shall not be excluded from the courtroom. Any of the parties can oppose the exclusion of any of the witnesses. By motion from any of the parties to this effect, the magistrate must hold a hearing, on the record, in which he will determine whether the person whose exclusion is being attempted is, as a matter of fact, excludable (Section 867).

One of the most revealing sections, for the purpose of the discussion of the

instant case, is that which provides that the preliminary hearing must be open and public. It has been so since its promulgation in 1872. Notwithstanding the latter, upon the request of the defense and after a finding by the magistrate that the exclusion of the public is necessary for the protection of the right of the defendant to a fair and impartial trial, the magistrate shall exclude every person from the hearing. Exempt from exclusion are the prosecutor and his assistant, the Attorney General, the district attorney for the county, the investigating officer, the custody officer or person in charge of a prisoner who is a witness while the witness is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness, who is not

himself a witness, but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss, prior to or during the preliminary examination, the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Upon a motion from the prosecution, members of the family of the alleged victim shall have a right to be present and seated during the preliminary hearing. This motion shall be granted unless the magistrate finds that the exclusion is necessary for the protection of the defendant's right to a fair and impartial trial, or unless information provided by the defendant or received by the magistrate establishes that there is a reasonable likelihood that the presence of

members of the family of the alleged victim pose a risk because their presence may affect the content of the testimony of the victim or of other witnesses. The court shall warn these persons that they must abstain from discussing any testimony with the other family members, witnesses or with the public. For the purposes of what has been indicated herein, "family members" will include the spouse of the alleged victim, the victim's parents, judicial guardian, children, or one of them (Section 868). [14] The option of holding the preliminary hearing in private is not solely the

defendant's. The prosecutor can avail

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[14] Section 868 of the California Penal Code was amended to provide as to the presence of the victim's relatives, and in 1968 to eliminate certain reference, in its final paragraph, to Section 867.

himself of it in some instances.[15]

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[15] In 1990 Section 859.1 was added, providing that in the case of sexual offenses where the victim is a juvenile sixteen (16) years old, or less, the court, upon a motion from the prosecutor will hold a hearing to determine if the proceedings should be conducted in private with the purpose of protecting the reputation of the juvenile.

As to the prosecutor's faculty to request that the preliminary hearing be held in private, Section 868.7 of the California Penal Code , which went into effect on January 1, 1987, provides that notwithstanding what is indicated in other law provisions, the magistrate can, upon a motion from the prosecutor, close the preliminary hearing in the manner provided in Section 868 during the testimony of a witness: (1) who is a minor and the complainant victim of a sexual offense and if his/her testimony before the general public has the possibility of causing her/him serious psychological harm and no alternate proceedings exist, including but not limited to, a videotape deposition or a contemporaneous examination in another place that communicates with the courtroom through a closed television circuit, that may prevent the prejudice to be received; (2) whose life is at risk of substantial danger if he/she were to appear before the general public and there exist no alternate security measures, including but not limited to, effort to conceal his/her

As part of the proceeding to be followed concerning the witnesses that

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features or physical description, search of the public present at the hearing and the temporary exclusion of any other actual or potential witnesses, that be adequate for minimizing the threat perceived. This section also provides, in every case where public access to the courtroom is restricted during the examination of any witness according to what is provided therein, that a transcript of the testimony of that witness be made available to the public as soon as it is practical to do so.

It must be pointed out that , concerning proceedings for cases of incest, rape, sodomy, seduction, lascivious and lewd acts, and indecent exposures, or for the attempt of any of these, our Rule 131 of Criminal Procedure allows the court to "exclude the public from the courtroom during the time that the testimony of the injured party lasts, admitting only those persons who have a legitimate interest in the case, such as court officials, counsel for the parties and relatives. Prior to the exclusion order the court shall hold a hearing in private to determine if the injured person needs this protection during his/her testimony".

testify at the preliminary hearing, it has been established that in cases of homicide the testimony of every witness must be reduced to writing, like a deposition, by the magistrate or some other person under his direction. In other non-homicide cases, the same shall be done upon a petition from the prosecutor, the accused or his attorney. In any of these instances, the magistrate before who the hearing is held, at his discretion, shall order the testimony and the proceedings stenographically transcribed, for which purpose he shall designate a court reporter. Also, a thorough process exists for the authentication of a deposition or testimony: (1) the witness has to be identified and details about his residence, place of work and profession have to be given; (2) the questions as

well as the responses must be written down, and read while being written or corrected, except when the testimony is taken down by a stenographer and it is not necessary to read back his answers to the witness; (3) the transcript shall include every question objected to by any of the parties and sustained, with the grounds for denying the question. If the witness refuses to answer a question, this and the reason for the refusal shall also be included in the transcript; (4) the witness shall sign the deposition; if he refuses to sign, he shall state in writing the reasons for the refusal. If there is a court reporter, the signature of the witness is not necessary. The court reporter has ten (10) days, as of the end of the preliminary hearing, to transcribe his/her notes (Section 869).

The depositions taken at the preliminary hearing or at the investigation shall be kept by the magistrate or his clerk until sent to the corresponding court. He shall not allow anyone to examine or copy them except a judge of the court with jurisdiction over the offense or that is authorized to issue "habeas corpus" writs, the prosecution, and the defendant and his attorney (Section 870).

Once the presentation of evidence is completed, if it arises thereof that no offense has been committed or that there is not sufficient cause to believe that the accused committed the offense, the magistrate shall order the dismissal of the complaint and the acquittal of the defendant (Section 871). When the complaint is thus dismissed, on these and

other grounds[16], the prosecutor can move in superior court with the purpose of compelling the magistrate to restore the complaint or the part of it that was dismissed, and in the same manner, to restore the custody status of the defendant under the same terms and conditions as when he last appeared before the magistrate. This motion shall be notified to the defendant and to the magistrate, and its only grounds must be that, as a matter of law, the magistrate erred as to the law when he dismissed the

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[16] Section 871 of the Penal Code provides for the prosecutor to go to the superior court to request the restoration of the complaint when it, or part thereof, has been dismissed according to the provisions of Sections 859b, 861, 871, 1008, 1381, 1381.5, 1387 or 1389 of the same code. He has fifteen (15) days, as of the date of the dismissal and acquittal, to present the motion wherein he requests restoration.

complaint or part thereof. The superior court shall hear and resolve the motion based on the record of the proceedings before the magistrate of instance. If the prosecutor decides to litigate the motion until its final resolution, he shall be impeded of moving again for the restoration of the dismissed action or the part of it that was dismissed. If the superior court refuses to restore the complaint or part thereof, the prosecutor can appeal said denial.[17] On the contrary, if the motion to restore is granted, the accused can request the revision of said decision [18] (Section

[17] The power to appeal is granted by paragraph nine (9), subsection (a) of Section 1238 of the California Penal Code.

[18] If restoration is ordered, the request for revision from the accused will be moved according to the provisions of Sections 995 and 999a of the California

871.5).

The foregoing exposition and discussion about some of the sections of the California Penal Code concerning the preliminary hearing proceeding, permits us to assess the scope of the manifestations of the federal Supreme Court that public access to the preliminary hearing, as it is conducted in California, plays a particularly significant role in the manner in which the process functions, since the court based its conclusion on the fact that the California preliminary hearing was sufficiently like a trial to justify it. Press-Enterprise II, supra, p. 12.

It is fitting that we now conduct a historical analysis of the development of

Penal Code.

the Puerto Rican laws of criminal procedure in order to then be able to compare the California preliminary hearing with that of Puerto Rico, and in this way be able to determine whether ours is alike to California's or sufficiently like a trial to justify that, with nothing more, the criteria of Press Enterprise II be applied as to the qualified right of access of the press and the public under the protection of the First and Fourteenth Amendments of the Constitution of the United States.

V. DEVELOPMENT OF THE PUERTO RICAN LAWS OF CRIMINAL PROCEDURE

Puerto Rican Law has developed in a unique manner, shaping itself through external forces, which, together with an internal impulse to forge our laws, wishes

to attain the formation of an autochthonous system adjusted to our culture, history and idiosyncrasy.[19] It is thus that two law systems converge in our island, the civil and the common law of Anglo-Saxon ancestry. What is notable

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[19]It has so been recognized by the Supreme Court of the United States on repeated occasions. In Fornaris v. Ridge Tool Co., 400 U.S. 41, 42-43 (1970), it stated:

> "The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws into the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'." (Supplied emphasis) See also Bonet v. Texas Co., 308 U.S. 463, 471 (1939); Bonet v. Yabucoa Sugar Co., 306 U.S. 505 (1939).

is how we have taken both systems to create one of our own, with characteristics in common, but molded and adjusted to our needs, values and traditions; in brief, to our people.

We echo the words of Gneist, as quoted by R. V. Pérez Marchand in La justicia penal en Puerto Rico y su necesaria evolución, 3 Rev. Jur. U.P.R. 96 (1933), "no nation has an innate sense of justice; and that this is the result of the influence of its customs and of the exercise of repeated experiences". This is the equivalent of saying that the foundation for all institutional life is in the mental and moral qualities of a nation, like forces accumulated by heredity. Id., p. 97. "Law is culture and culture is historical experience, both for being culture as for being historical

experience Law is in constant transformation and does not admit stratifications". E.I. Couture, El porvenir de la codificación y del 'common law' en el continente americano, XVIII Rev. Jur. U.P.R. 10 (1948).

The development of penal procedural law[20] was transformed during the XIXth century from an inquisitorial system into

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[20] The subject of the development of penal procedural law has been discussed by the following authors: D. Nevares-Muñiz, Sumario de derecho procesal penal puertorriqueño, 3a Ed. Revisada, Hato Rey, Inst. para el Desarrollo del Derecho, (1989); C. Delgado Cintrón, Historia de la codificación penal en Puerto Rico, VIII La Toga 30 (1975); E. A. Torres, The Puerto Rico Penal Code of 1902-1925: A Case Study of American Legal Imperialism, 45 Rev. Jur. U.P.R. 1 (1976); M. Rodríguez Ramos, Breve historia de los códigos puertorriqueños, 19 Rev. Jur. U.P.R. 233 (1950); R.V. Pérez Marchand, La justicia penal en Puerto Rico y su necesaria evolución, 3 Rev. Jur. U.P.R. 96 (1933); O. E. Resumil de Sanfilippo, Drecho procesal penal, Equity Pub. Co., 1990.

a accusatorial system. In the former the judicial branch was part of the executive branch and in the proceedings, the judge participated actively in the investigation bearing the burden for the accusation and adjudication of the case.

In 1888, the Law of criminal procedure of Spain (Ley de Enjuiciamiento Criminal) was extended to Puerto Rico, as amended in 1882. This was in response to an effort to uniform peninsular and overseas law. It is through the approval of this law that the inquisitorial system is changed for the accusatorial system. The following innovations are introduced into the system: oral and public trial, separation of criminal and civil cases as to sentencing court and trial judge, one single instance instead of the two jurisdictional degrees, and intervention

of the accused in all steps of the proceedings.

In 1981 the judicial organization was consolidated, by means of the Ley Orgánica del Poder Judicial (Translator's note: Organic law of the overseas judiciary), which divided the island, for judicial purposes, into districts, municipal districts and lots. It also reorganized the general Solicitor Office and relocated the jurisdictional boundaries of the courts that existed under the previous law and created another "Audiencia de lo Criminal" (Translator's Note: Criminal Court). This Court ("Audiencia") had original jurisdiction in all felonies. The summary or preliminary investigation of the offense was carried out by the trial courts. This investigation was then referred to Criminal Court and based on

this document and on other investigations he might conduct, the prosecutor would formulate the accusation. The determinations of the Criminal Court ("Audiencia") could be appealed before the Supreme Court of Madrid. This is concerning the organization of the courts. As to the penal procedure, Dr. Dora Nevares-Muñiz explains it to us in the following manner:

"In the arrest warrant, the charges were not included; after the arrest the accused was kept incommunicado and was examined by a judge in private. After the examination of the witnesses by the judge, he would prepare the summary of the case and would send it to the "Audiencia" (Criminal Court)for trial. At that moment, the prosecutor would examine the summary and show it to the defense attorney. The prosecution witnesses testified first, followed by those for the defense. The written arguments of both parties concluded the case and then the judge (or the judges) would issue judgment and impose penalty". D. Nevares-Muñiz, Sumario de derecho procesal penal puertorriqueño, 3a Ed. Revisada, Hato Rey, Inst. para el Desarrollo del Derecho,

(1989) pp. 8-9.

This was, basically, the state of the law in Puerto Rico in the area of penal procedure at the time of the American invasion.

> "When the invasion started, on July 25, 1898, this country was living under a legal code that was the end result of progress during ages, and it was deeply rooted in a system of laws that had been granted it for a dozen generations, since the discovery of America, and to its ancestors in Spain, a thousand years before that discovery; a system derived from Roman law, which has been in effect in the peninsula for centuries, and brought, from there to this colony by the first settlers.

Of course, with the arrival of the Americans, different ideas arrived and the law in effect in the United States, as it had arisen from the Anglo-Saxon institutions, based on the common law of England was immediately put in contact with the Spanish law, which ruled in Puerto Rico. But changes did not take place immediately, not until the establishment of the Civil Government took place, in the year 1900 by virtue of the Foraker Act, with the exception of those slight changes, but

necessary, found in the military orders." Ex-parte Mauleón, 4 D.P.R. 123, 134-135 (1903). (Concurring op. of Mr. Associate Justice MacLeary).

When the change in sovereignty occurred, the Ley de Enjuiciamiento Criminal de España (Translator's note: Law of criminal procedure of Spain) was left in effect, with some exceptions, by virtue of General Order No. 1 of October 18, 1898. Some later General Orders affected the criminal procedure, including General Order No. 118, of August 16, 1899, which set rules of criminal procedure.

During the military government the United States Secretary of War appointed an Insular Commission to conduct a study and research and make recommendations concerning the well-being of the island. In the report submitted it was held that the Spanish legal and procedural system,

although not altogether bad, differed so radically from the American in principle and structure as well as in methods and forms of practice, that the best method for americanizing Puerto Rico was to give it the benefit of the entire American system and not try to insert partial reforms into the Spanish system. The members of the Commission recommended that all the Spanish laws, including the codes that were in effect and all the royal decrees applicable to Puerto Rico, be repealed and that common law be adopted as applicable in the states of the Union. E. A. Torres, The Puerto Rico Penal Code of 1902-1925: A Case Study of American Legal Imperialism, 45 Rev. Jur. U.P.R. 1.

On April 12, 1900 the Organic Act known as the Foraker Act was approved, which established an American civil

government in Puerto Rico. In its Article 40 the creation of a Commission was authorized to revise and compile the laws of Puerto Rico. The commission met on several occasions but did not complete its assignment although it made a series of recommendations. In its report to the United States Congress it stated:

> "There is no doubt that it was the purpose of Congress to harmonize the institutions of the island with the American system, doing this, nevertheless, without sudden changes that might cause burden and expense to the inhabitants, thus undermining their respect toward the Law. The effort that the study of new legal systems meant and its adjustment to daily life, falls on the community with all the vigor of a new and unexpected load. Whatever violent changes will awaken a spirit of passive resistance as impediment to all the efforts to americanize the island. It should be borne in mind that the basis for the Spanish codes is the Civil or Roman Law, which, being during centuries the only system in the countries from which we derive the Common Law, can be considered the source of origin for the latter, to

> which it has lent many of its wholesome rules. The United States legal system is completely compatible with the preservation of institutions that have resisted the test of time and of experience in most advanced countries of Europe and South America.
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> The Commission confronted a problem for which few precedents existed intheAmerican or foreign Law. It is true that in New Mexico and California we were placed in contact with the Spanish system, but it was under circumstances whose history does not shed light on the situation in Puerto Rico. The Commission was not appointed to totally sweep away the island's legal system, but rather, to preserve the native institutions which have shown evidence of vigor and growth and to adapt them to the fundamental principles of American Law...By adjusting to this plan, the most pressing needs of the island shall be solved, allowing that the following reforms be gradually established by the Legislative Assembly of Puerto Rico." (Cites omitted and supplied emphasis.) M. Rodríguez Ramos, Breve historia de los códigos puertorriqueños, 19 Rev. Jur. U.P.R. 233, 267 (1950).

Notwithstanding this conciliatory language, the purpose of the Codification Commission was assimilation within the

institutions. The actual debate within the Commission was not about whether Puerto Rico should be americanized or not, but about the best way of doing it. Among the recommendations made by the Commission was the substitution of three codes- the Penal Code, the Criminal Procedure Code and the Civil Procedure Code. J. Trías Monge, El choque de dos culturas jurídicas en Puerto Rico, Equity Pub. Co., 1991, pp. 90, 94.

In January 1901, when the First Legislative Assembly of Puerto Rico met, a second Codification Commission was appointed, composed of two Americans and one Puerto Rican. This Commission, contrary to that authorized by the Foraker Act, was specifically commissioned for the codification of the laws of Puerto Rico. It was known as the Rowe Commission since

its chairman was Leo S. Rowe. It was composed of two members of the previous one, Rowe and the Puerto Rican Juan Hernández López. It prepared and submitted to the Legislative Assembly two codes which were converted into Puerto Rico laws, notwithstanding the opposition of the only Puerto Rican in the Commission. The "Código Penal" and the "Código de Enjuiciamiento Criminal" (Translator's note: The Penal Code and The Criminal Procedure Code, respectively)were prepared using as a model the California Penal Code, and in truth, many of the articles and chapters seem like an exact copy of that law. Nevertheless, there was one difference and it is the following: for reasons of convenience, as it appears stated in the report submitted by the Commission, the California Penal Code

which includes, in one single law, three parts, that deal respectively with the offenses and the punishments, with criminal procedure, and the one on prisons or jails, was divided into two codes that were titled The Penal Code and the Criminal Procedure Code, following the method the people were formerly accustomed to under Spain's sovereignty when penal codes had those denominations." Ex parte Mauleón, supra, p. 136. These codes went into effect on July 1, 1902 and the objective sought in approving them, without any doubt, was to substitute the entire Spanish penal law system with a complete American system. Ex parte Mauleón, supra, p. 141.

Why was the California Penal Code chosen? Because the codificators, and specifically John M. Keedy, since he was

in charge of the presentation of the drafts for the Penal Code and the Criminal Procedure Law, considered that it was a sound basis for the Puerto Rican laws since they had the Spanish heritage in common. Unfortunately, they were mistaken. In 1850 California became a state and even though it is true that up to that moment Spanish law ruled, its firs legislature approved a law repealing those in effect and approved another law adopting the common law of England as the law of the State. Thus, then, when the California Penal Code was transplanted to Puerto Rico it was totally alien to the hispanic system. Professor Eulalio Torres quotes a comment to that effect: "I don't know why Keeny chose the California Penal Code for this Island. Maybe he thought that it was the American penal code

closest to a hispanic culture- Mexico's. In the same manner he could have chosen the Maine Penal Code. It would have been as alien to this culture." Torres, supra, p. 34. [21]

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[21] Along that same line, it has also been questioned the convenience of adopting laws from other jurisdictions, and more so, the practice of importing these laws together with the interpretation given them at their place of origin. In this practice, it is then the foreign legislator who is legislating for Puerto Rico, not with our social problems in mind but according to the problems of his community. M. Rodríguez Ramos, Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico, XXIII Tulane L. Rev. 344, 365 (1949).

In Puerto Rico, the legislative process was, from the beginnings of the civil government regime under the United States, an agent of change, but a change of external impulse and a direction alien to the juridical tradition of this country. Puerto Rican participation in the forging of the laws was essentially reduced to the potential use of the veto power that its control of the Chamber of Delegates ensured it in the face of the legislative program of the official

Antonio Quintano Ripollés, in his book La influencia del Derecho Penal en las legislaciones hispanoamericanas, Madrid, Eds. Cultura Hispánica, 1953, pp. 162-163, criticizes the manner in which the californian version of the Penal Code was adopted when he stated that "therein was not respected, as it was to be expected, the juridical Spanish tradition in which the island had lived for centuries, not even as to its grammar, being the text the most extravagant gibberish imaginable. It seems unanimous, among scientific circles in Puerto Rico, the decision to abandon such an exotic, as

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element. The orientation that was imprinted on the legislative process was not new. The assimilative course was taken since very early during the time of the military occupation. J. Trías Monge, El sistema judicial de Puerto Rico, Ed. Universitaria, 1978, pp. 68-69.

well as antiquated, body of laws, finally returning to the ideal traditions of the Law, to the moral and the civilization that are its own, according to the words of one of its better qualified jurists, the professor of Penal Law, Mr. Santos P. Amadeo".

Concerning the official efforts of massive americanization, there arose in Puerto Rico a variety of opinions. Among those opposing it was José de Diego, who stated:

> At the end of 1898, the change of sovereignty took place, when in the caribbean (sic) sank, as the shipwreck of a sun, the Spanish flag, and at the beginning of the year 1902, the Codes of Montana and California substituted those of Spain, were being translated into Spanish, were being imposed by the conqueror on the obligatory meekness of the conquered people.
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> What happened naturally during two centuries was intended to happen here in two years, or what was

> elaborated by means of the continuity of a progressive transformation, was attempted here by the sudden force of displacement. There is the fact, in appearance, accomplished: the Codes of Montana and of California rule in Puerto Rico, hangings are carried out following the Montana procedure, prosecutions following the California procedure." Trías Monge, supra, p. 97.

During those first years of the XX century, two great legal systems clashed in Puerto Rico, on many occasions under the criticism of the Puerto Rican jurists who saw the imposition of certain laws as absurd. There was much criticism since the traditions of civil law were not respected in the supposed manner.
Again, the creation of an autochthonous law system was delayed. It was not until years had elapsed that this was accomplished.

In 1917 the Jones Act was approved, which ruled the Puerto Rico system of

government until 1952. This included a "Declaration of Rights" wherein were incorporated all the individual rights guaranteed by the United States Constitution, with the exception of the trial by jury and the institution of the grand jury. In Balzac v. Porto Rico, 258 U.S. 298 (1922), the federal Supreme Court decided that the guarantee of a trial by jury consecrated by the Sixth Amendment of the federal Constitution was not applicable to Puerto Rico. The fact of the exclusion of the right to a trial by jury from the Jones Act responded to that Congress considered that the Puerto Rican people, accustomed to a law system without jury, and of set customs, should be allowed to determine when and to what extent they wanted to accept that institution of Anglo-Saxon origin. Balzac

v. Porto Rico, supra, p. 310. From 1900 until the approval of the Jones Act, the United States was liberal by granting the island most of the constitutional guarantees, but at the same time it exerted caution by not forcing the jury system on a civilistic country, until it wanted it. Id., p. 311. It must be pointed out that since January of 1901, the law establishing the trial by jury in Puerto Rico had already been approved, applicable only to certain criminal cases. In 1902, when the new Criminal Procedure Code was approved, all the provisions concerning the trial by jury were included. Nevertheless, the jury trial system did not enjoy in Puerto Rico the expected success. B. Ortiz, El derecho común como vehículo de expresión en nuestra cultura, 5. Rev. Der. y Jur. 133,

139 (1940). It was not until 1952, with the approval of the Constitution of the Commonwealth of Puerto Rico, that the right of a person accused of a felony to a trial by jury was elevated to constitutional right. In the federal Constitution, contrary to ours, the right to a trial by jury exists for all criminal cases. On the other hand, this right has not been recognized in Puerto Rico for civil cases nor in criminal cases concerning misdemeanors.

The purpose in tracing the history of this right is to highlight how a juridical institution, Anglo-Saxon in origin, was adapted to our particular needs, having, like we mentioned before, common characteristics but adjusted and molded to our particular circumstances.

"Juridical systems should not close

> themselves to enriching contributions from other traditions. Neither should they open to the extent of relinquishing their character. Mixed systems of law live in a continuous state of tension regarding the destiny that awaits them: the absorption of one culture by another, or descending to a juridical hodgepodge, or the preservation and broadening of the cultures that coexist in their midst and the eventual production of a law of their own." Trías Monge, supra, p. 401.

This is the perspective with which we should also analyze the purpose of our preliminary hearing. This is also a juridical institution of Anglo-Saxon origin, whose concept was recently adopted by us in order to fill certain needs of our penal procedural system. "The problem of Puerto Rico is one of selection, elimination and adaptation of juridical standards, from the point of view of the particular needs of our own community... Nevertheless, what is essential is that we

do not limit ourselves to the adaptation process. Mere imitation can be highly prejudicial. We must study the foreign legal systems from the standpoint of our own environment. We must create, transform, establish new principles and new juridical methods that adapt to our Puerto-Ricanism without its implying that we must reject the influence of foreign legal systems. Our duty, before anything, is to determine the economic and social reality that has produced the legal principle in a foreign country and then verify whether that juridical principle responds to the needs of the Puerto Rican environment, or if the insular reality demands the creation of a new principle." Ortiz, supra, pp. 136-137.

Thus, then, the Criminal Procedure Code was revised in 1935. Afterwards, and

complying with Article V, Section 6 of the Constitution of the Commonwealth of Puerto Rico,[22] we adopted the Rules of Criminal Procedure for the General Court of Justice, as submitted to the Legislative Assembly and amended, in 1963.[23] After the approval of our Constitution, the "Ley de la Judicatura" (Translator,s note: Judiciary law), whose Section 2 provides

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[22] This article provides the following:

"The Supreme Court shall adopt, for the courts, rules of evidence and of civil and criminal procedure that do not impair, enlarge or modify substantive rights of the parties. The rules so adopted will be submitted to the Legislative Assembly at the beginning of its coming ordinary session and will be in force sixty days after the end thereof, except by disapproval of the Legislative Assembly, which will have the power, during that session or afterwards, to amend, repeal, or complement said rules by means of specific law to that effect."

[23] These appear in 34 L.P.R.A. App. II.

that the Supreme Court shall adopt, inter alia, rules of criminal procedure. When the 1963 Rules went into effect, the Criminal Procedure Code ("Código de Enjuiciamiento Criminal") was repealed regarding everything not compatible with the new rules.[24]

With this background, we can proceed to analyze the preliminary hearing in Puerto Rico.

VI. THE PRELIMINARY HEARING IN PUERTO RICO

The preliminary hearing was not present in our penal procedure system until after the first half of this century. Although at the beginning of the century a Code of Criminal Procedure was

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[24] In 34 L.P.R.A., appear the provisions that remained in effect.

adopted for Puerto Rico, practically copied from the one in California, all those state's articles concerning the preliminary hearing were left out. In California as well as in the federal system and in England, the preliminary hearing proceeding similar to that conducted in California, practically a mini-trial, has been as a general rule, open to the public. L.B. Orfield, Criminal Procedure from Arrest to Appeal, N.Y. Univ. Press, 1947, Ch. II, pp. 87-88; Press Enterprise II.

The preliminary hearing mechanism exists in Puerto Rico since the middle of 1964, the date when Rule 23 of Criminal Procedure.[25] went into effect.

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[25] Rule 23 of Criminal Procedure, as amended, provides the following:

"(a) When it will be held. A

preliminary hearing shall in those cases where a person is being accused of a felony. In these cases held the person shall be summoned for the hearing at least five (5) days before it is held. In those cases where it has been shown for the record, according to Rule 22(c), that the person does not have the financial means to retain legal counsel, the corresponding judge shall appoint him an attorney and his name shall be included in the summons for the preliminary hearing. The judge shall notice said hearing to the attorney.

(b) Waiver. After being summoned, the person shall be able to waive the preliminary hearing in a written document to that effect and signed by the person and submitted to the judge prior to the commencement of the hearing, or, personally at any time during the hearing. If the person waives the hearing or does not appear at it after being duly summoned, the judge shall detrain the person in order to answer for the commission of an offense before the corresponding Part of the Superior Court.

(c) Procedure during the hearing. If the person appears to the preliminary hearing and does not waive it, the judge shall hear the evidence. The hearing shall be private unless at the commencement thereof the person requests that it be public. The person shall be able to cross-examine the witnesses against him and offer evidence on his behalf. The prosecutor will be able to be present at the hearing and shall also be

able to examine and cross-examine all the witnesses and offer other evidence. Upon being requested to, the prosecutor shall make available to the person the sworn statements that he has in his possession from the witnesses that he had testify at the hearing. If, according to the judgment of the judge, the proof showed that there is probable cause o believe that an offense has been committed and that the person committed it, the judge shall immediately detain the person so that he may answer for the commission of an offense before the section and part of the corresponding Court of Instance; otherwise he shall acquit the person and order that he/she be released. The judge shall be able to maintain the person free under the same bail and conditions, or both, that were imposed on the person when arrested, shall be able to alter same or to impose a bail and conditions according to Rule 218(c) if not already imposed and if, in the opinion of the judge, this were necessary. Notwithstanding the above, the judge shall not be able to alter the bail or the conditions imposed by a judge of higher category, unless at the preliminary hearing probable cause is found for an offer lesser than the one he was originally accused of. After the proceedings before him end, the judge shall immediately remit to the corresponding clerk of the section and part of the Court of First Instance the entire file concerning said proceedings, including any bail furnished. The file

This rule, nevertheless, had been under discussion since 1958 when it was proposed and analyzed by the Criminal Procedure Committee of the Judicial Conference of Puerto Rico during its First Plenary Session. Upon presentation of its draft of the Criminal Procedure Rules, the Committee emphasized its innovations, being one of them the preliminary hearing mechanism. Speaking about the origin of the preliminary hearing rule, Attorney Francisco Ponsa Feliú, Chairman of the Criminal Procedure Committee, pointed out that it had originated and was "fundamentally inspired" on the federal

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shall include the date and place of the preliminary hearing , the persons who appeared and the judge's finding." (Supplied emphasis)

Rule,[26] ...a Rule that, like all the federal provisions of criminal procedure, is framed in general terms, in broad terms, in far-reaching terms and concepts, without the slightest effort to

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[26] According to Attorney Ponsa Feliú's paper, the "sources of origin" of the Rules of Criminal Procedure Draft Project prepared by the Judicial Conference are the following:

"First, the Code of Criminal Procedure in effect. Second, the Laws of Puerto Rico that at present are not incorporated in the Criminal Procedure Code but that have to do with the subject. Third, the Federal Rules of Criminal Procedure. Fourth, the Model Code of the American Law Institute. Fifth, the California Penal Code, in its procedural part. Sixth, the Rules of Civil Procedure in effect. Seventh, sa draft for Rules of Criminal Procedure prepared and submitted by Professor Donnelly. Eighth, original provisions by the members of the Criminal Procedure Commission." Conferencia Judicial de Puerto Rico, Memoria de la Primera Sesión Plenaria, 11, 12 y 13 de diciembre de 1958, Tribunal Supremo de Puerto Rico, pp. 140-141. (Translator's note:Judicial Conference of Puerto Rico, Memoirs of the First Plenary Session).

particularize or resort to detail". Conferencia Judicial de Puerto Rico, Memoria de la Primera Sesión Plenaria, 11, 12 y 13 de diciembre, Tribunal Supremo de Puerto Rico, p. 144. When Attorney Ponsa Feliú expounded on our preliminary hearing draft, he stated the following:

> "The preliminary hearing, as we can see in provision (b) of Rule 18 and in provision (c) of Rule 18, is one in which the accused will have the right to cross-examine adverse witnesses and to present witnesses on his behalf, and the mission of the judge shall be, based on the evidence he hears, to determine the existence of a probable cause. A concept known by all and whose juridical content, naturally, the rules do not attempt to define, since it already has it based on the jurisprudential doctrine of the existence of probable cause. Afterwards, the prosecutor will not be under the obligation of offering all his proof nor anything like it. He will offer sufficient proof for the judge, based on that proof, to make and affirmative finding of probable cause. If the judge finds probable cause, and that is the moment then in which , according to the doctrine, the accused would be "held to answer",

> detained to answer, at that moment, when the judge finds that there is probable cause, what he does, precisely, is that: he holds the accused to answer before the corresponding court. The Rule says "corresponding" because, although there is not a right to a preliminary hearing for a misdemeanor, the case could happen where, imputed a felony that causes holding a preliminary hearing, the finding of probable cause that the judge makes, be only for a misdemeanor. In that case, the accused would be held to answer, no longer before the superior section, but before the district section of the Court of First Instance.
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> There are no provisions requiring that what elapses at the preliminary hearing be taken down stenographically, nor specifically in any other way. And not because the matter went unnoticed to the members of the Committee--it was a matter which was amply discussed, and the decision of the Committee was to leave it that way. The magistrate shall, nevertheless, in a way not established by the Rule, depending on the means that he has within reach - nothing would prevent that, if he has a stenotypist within reach, or if in a special case it is wanted to use a stenotypist, that the judge use him, but it is not indispensable - according to the means within his reach, the judge shall, and the judge

must prepare the file for of the case heard before him and he then is under the obligation to remit it to the corresponding section and part. That file, then, in an exceptional case might consist of the transcript of the statements; in another case it could consist of narrative statements transcribed in typing signed by the witness or witnesses; in another case it could consist of the notes taken, in handwriting, by the judge himself, signed by the witnesses. In other words, it can materialize in different forms, depending on the circumstances of the case, of the available means, and on the needs of each situation. It seemed to the Committee that it was not advisable to set and inflexible method that demanded a definite procedure for all cases, because, there would certainly be a large number of cases that would not warrant the effort, the time, and also there would be situations where maybe there would not be available means to establish that kind of requirement in all the district courts of the Island. Due to that reason it was left that way, without a clear requirement as to that matter. Of course, one could talk about the preliminary hearing so and so much, that I am not going to try to talk any more (sic). I shall, simply, point out those general elements. There are many other things that would have to be clarified , but that can be subject of clarification at some later occasion." (Original

emphasis). Conferencia Judicial de Puerto Rico, Memoria..., supra, pp. 144-145.

In his presentation concerning the preliminary hearing draft project, Attorney Ponsa Feliú did not make any mention of the private nature of the preliminary hearing. As to the other characteristics by him mentioned, the preliminary hearing has been developing, with some variations, such as it was drafted.

It must be noticed that our preliminary hearing is of statutory origin. It does not originate from any constitutional provision. N. Frattallone Di Gangi, La vista preliminar, 63 Rev. Der. Puertorriqueño 232 (1977). The hearings of this nature can be placed (sic) into two types or models according to their purpose or end: the retrospective

vision model and that of prospective vision.

> "As the term suggests, the main concern of the retrospective vision model is in regard to the legality of the arrest and the validity of the detention. The inquiry at the hearing manifests itself in the investigation towards the past, at the moment of the arrest. It is designed to detect illegal detentions of all kinds. Its interest is centered on a revision of the legality of the arrest. The aspect of the preliminary, non-determining nor final nature of the proceeding is emphasized. The proceeding is not a trial but an initial mechanism to check the validity of the arrest. The focus of the investigation mainly concentrates on the facts that caused the arrest, in contrast to the possible innocence of the accused from the juridical point of view.
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> "The prospective vision model orients itself towards the future: the trial. The interest revolves around the probability of guilt or of innocence of the accused. It is emphasized a concern for avoiding or preventing ulterior unnecessary proceedings. Due to the central and more active role that the judge plays, its more judicial nature is emphasized, in contrast with the first model that was pointed out. It can assess the credibility of the

> witnesses and be prepared to dismiss the charges if he considers insufficient the proof presented by the prosecution. This latter aspect is fundamental to the prospective model." Pueblo v. Rodríguez Aponte, 116 D.P.R. 653, 666-667 (1985).

In Puerto Rico we have recognized characteristics of the two models in our preliminary hearing, by reason of which it is more eclectic although "it shyly approximates to the prospective vision". Pueblo v. Rodríguez Aponte, supra, p. 667. Jurisprudentially, we have been defining its outline according to the difficulties that its application has presented. [27]

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[27] Legislatively, it has also undergone change. One of the most notorious was that introduced by Law No. 29 of June 19, 1987 with the purpose of limiting the holding of the preliminary hearing to certain situations in particular. Recently, Law No. 26 of December 8, 1990 again amended paragraph (a) of Rule 23 of Criminal Procedure, 34 L.P.R.A. App. II, with the purpose of

In Puerto Rico, it is the determination of probable cause at a preliminary hearing what authorizes the prosecutor to initiate the adjudicative phase of the process through the filing of the indictment. The preliminary hearing is granted only in the case of felonies and although the accused can waive the hearing, for it to be acceptable, said waiver must be voluntarily and intelligently made. Rule 23(b) of Criminal Procedure, supra; Pueblo v. Vélez Pumarejo, 113 D.P.R. 349 (1982).

The preliminary hearing has been defined as " a procedural institution of statutory nature", O.E. Resumil de

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restoring the state of law prevalent before Law 29 went into effect, supra; that is, to guarantee the person accused of a felony the holding,at all times, of a preliminary hearing.

Sanfilippo, Derecho procesal penal, Practica Jurídica de Puerto Rico, Equity Pub. Co., 1990, Tomo I, Cap. 15, p. 371, whose purpose "...is to avoid that a citizen be arbitrarily and unjustifiedly subjected to the rigours of a criminal proceeding". Pueblo v. López Camacho, 98 D.P.R. 700, 702, (1970). "The hearings offers an opportunity for the prosecutor to show that there exists probable cause to believe that an offense has been committed and that the person before the judge committed it". Once this has been shown, the hearing has accomplished its purpose of law...". Id. In other words, it will have been accomplished "...finding whether it is necessary to hold a plenary trial against the accused, with the onerous consequences that it entails for him as well as for the state". Pueblo v.

Rivera Alicea, Op. of December 19 of 1989, 125 D.P.R. ___ (1989), 89 J.T.S. 108, p. 7281. Once the trial judge is convinced of the existence of probable cause , he may, within his power to regulate the presentation of the proof of the defense, decide not to continue hearing the proof, that is, not to hear the proof of the defense.[28] Resumil de Sanfilippo, supra, pp. 381, 385.

From its beginnings, in our jurisdiction, different from that of California, the preliminary hearing has had a private nature by express provision of the rule itself that gave it procedural life. Rule 23(c) of Criminal Procedure, supra. By means of a footnote to that

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[28] See Pueblo v. Cruz Bayona, Sentence of June 30 of 1989, 124 D.P.R.____(1989), J.T.S. 76.

effect, we indicated in Pueblo v. Rodríguez Aponte, supra, p. 665, N.C. 3, that this private nature of the preliminary hearing "tends to minimize the negative publicity impact on who is finally acquitted".

Once it is decided to hold the preliminary hearing, in order for the judge who presides it to be able to order the detention of the person accused of the offense, the proof must show that there exists probable cause to believe that an offense was committed and that the accused was its author. Vázquez Rosado v. Tribunal Superior, 100 D.P.R. 592 (1972). That is: "In the light of the elements of the offense imputed the judge shall determine if such proof establishes the probability that all the elements are present, to wit, the probability that such

imputed offense was committed. Concomitant to said review, he must determine whether proof exists that probably connects the accused with the offense probably committed". Pueblo v. Rivera Alicea, supra, p. 7282. In order to prove the existence of probable cause, the prosecutor is not under the obligation to present all the proof that he has available. He does not have to prove the guilt of the accused beyond all reasonable doubt. Pueblo v. Figueroa Castro, 102 D.P.R. 279, 284 (1974). By its nature, at the preliminary hearing "the credibility of the witnesses is subordinate to the quantum of proof required at this stage". Pueblo v. Rodríguez Aponte, supra, p. 664. The preliminary hearing is not, and should not turn into, a "mini-trial"; all that is

required to determine the existence of probable cause is a proof that will prima facie establish that the offense was probably committed and that it was the accused who probably committed it. Once the prosecutor shows this, the trial judge does not have to continue hearing proof.

On its part. the accused of an offense has a right, limited at the judge's discretion, to cross-examine prosecution witnesses, and, inclusively, to present defense proof that will defeat the probability of his vinculation with the offense as the author thereof. Pueblo v. Velez Pumarejo, supra. In Pueblo v. Rodríguez Aponte, supra, we pointed out that an accused is not assisted by an absolute right to examine prosecution witnesses, at a stage prior to the trial on its merits, as is the preliminary

hearing. We pointed out there that "prior to the trial, the right of the accused to examine or interview prosecution witnesses is circumscribed only at the will of the witnesses." Pueblo v. Rodríguez Aponte, supra, p. 660.

In Hernández Ortega v. Tribunal Superior, 102 D.P.R. 765, 769, (1974), we decided that there did no exist " a reason in our juridical code to judicially prohibit the presentation of the insanity defense on the occasion of the preliminary hearing". In tune with the investigative judicial nature of said hearing, we resolved that "the judge does not have to finally adjudicate whether the affirmative defense will eventually prevail or not, beyond reasonable doubt, at the hearing on its merits of these cases. Its function is strictly to assay the reasonability of

exposing a person accused of an offense to the severity of a criminal trial". (Supplied emphasis). As it may be observed, in our preliminary hearing the accused can present the defense of mental insanity or "madness", but without it entailing the conversion of the hearing into a separate trial to decide on its merits, to the mental incompetency of the accused when there is unclear proof or contradictory expert proof. Pueblo v. León, supra. As to whether it can be presented equally an evidence suppression motion, we have not stated anything.

Since, in its basic function the preliminary hearing limits itself to the determination of whether there exists, or not, probable cause to believe that an offense has been committed and that it was committed by the accused, and not whether

he is guilty or innocent, the prosecutor is under the obligation to present that proof which at least establishes a prima facie case against the accused. Pueblo v. Rodríguez Aponte, supra. If the evidence presented does not show the probability that an offense was committed and the probability that the accused committed it, the judge is under the obligation of acquitting him and ordering his release, subject to possible ulterior formalities. Pueblo v. Felix Avilés, Op. of May 24, 1991, 128 D.P.R.___(1991), 91 J.T.S. 50; Pueblo v. Méndez Pérez, 120 D.P.R. 137 (1987); Pueblo v. Rivera Colón, 119 D.P.R. 315 (1987); Pueblo v. Báez Molina, Op. December 18, 1991, 125 D.P.R.___(1991), 91 J.T.S. 102. If probable cause is found, the prosecution is empowered to present the indictment

against the accused, although is not in the obligation of doing so. (Rule 24(b) of Criminal Procedure.

Finding that there is no cause does not end the investigative judicial process period in our preliminary hearing. If the accused is acquitted or the judge finds probable cause to indict him for a misdemeanor included in the offense or for an offense different from the one imputed, the prosecutor can resort to a judge of higher hierarchy, within the Court of First Instance, for him to determine probable cause to indict for the imputed offense. Rule 24(c) of Criminal Procedure, 34 L.P.R.A. App. II; Alvarez v. Tribunal Superior, 102 D.P.R. 236 (1974); Pueblo v. Figueroa Castro, 102 D.P.R. 279 (1974); Nevares-Muñiz, supra, p.89. The prosecutor may continue his

investigation and at this new hearing for probable cause, called preliminary hearing on appeal, he may present the same proof he had brought before or he may present different proof if he so deems convenient. Rule 24(c), supra. The preliminary hearing on appeal is not considered an appeal of the initial hearing. It is an independent , separate and different hearing. The finding, on the merits, made in it as to the existence or not of probable cause shall be final and is not reviewable. What only shall be reviewed, by means of a certiorari, will be any other findings, as to the law, there made. Pueblo v. Cruz Justiniano, 116 D.P.R. 28 (1984).

If there is again an affirmative finding of probable cause, the prosecutor has the discretionary power to go on, or

not, with the process. If he decides to continue, he shall file the indictment. Once the prosecutor files the indictment, and at the moment of making his plea or prior to pleading, the accused can move, in turn, for a dismissal under Rule 64(p) of Criminal Procedure, 34 L.P.R.A. App. II; Pueblo v. Mena Peraza, 113 D.P.R. 275 (1985). At the time of the presentation of this motion, the grounds thereof must be alleged so that the accused may move the discretion of the court so that it orders a hearing in which he will have the opportunity to show that the finding of probable cause to indict was not made in accordance with the statutes and the Law. Rule 64(p), supra, Vázquez Rosado v. Tribunal Superior, supra,; Pueblo v. Gonzalez Pagán, 120 D.P.R. 684 (188); Pueblo v. Rivera

Alicea, supra.

The decision made by the judge in a preliminary hearing has a legal presumption of correctness. Pueblo v. Tribunal Superior, 104 D.P.R. 454 (1975). This obeys to the fact that the judge, upon making his finding, acts between the parties as a judge and not as interested party. Pueblo v. Opio Opio, 104 D.P.R. 165, 171 (1975); Pueblo v. Padilla Flores and Ceballo Fuentes, Op. of January 16, 1991, 125 D.P.R.--- (1991), 91 J.T.S. 2, p. 8261.

VII. COMPARISON OF THE PRELIMINARY HEARING CONDUCTED IN CALIFORNIA TO THE PRELIMINARY HEARING PROCEEDING IN PUERTO RICO

The preliminary hearing proceeding is guaranteed, in Puerto Rico as well as

in California, to any person accused of committing a felony.[29] The purpose of the California preliminary hearing is to determine whether there is probable cause to believe that the accused committed a felony. California Penal Code, Section 866. On the other hand, the purpose of our preliminary hearing is to offer the prosecution the opportunity to "show that there exists probable cause to believe that an offense has been committed and that and that the person before the trial judge committed it". Pueblo v. Lopez Camacho, supra, p. 702. That is, for the prosecutor to show a "scintilla" of proof that justifies that the process pass from

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[29] The California code provides for a preliminary hearing for any person accused of an offense for which the superior court of said state has jurisdiction. California Penal Code, Section 859b.

the judicial investigative phase to the adjudicative phase through the filing of an indictment.

In California, the preliminary hearing takes place after the arraignment(Section 859b); while in Puerto Rico it is precisely the finding of probable cause after the preliminary is held what authorizes the prosecutor to file the indictment. In both proceedings the person has the right to be assisted by counsel,[30] to cross-examine all the witnesses against him and to offer evidence in his behalf. The prosecutor

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[30] In California the accused has the right to appear personally at the hearing when the court finds that he can do so. In Puerto Rico, Rule 23(a) of Criminal Procedure, 34 L.P.R.A. App. II, provides that: "In those cases in which it is shown on the record ...that the person cannot obtain legal assistance, the corresponding judge shall appoint him an attorney...".

can also examine and cross-examine all the witnesses. In Puerto Rico, upon the request of the accused, the prosecutor shall place at the disposal of the accused the sworn statements in his possession from the witnesses that he had testify at the hearing. in California, once the counsel for the accused appears, or if it is found that he can represent himself, the prosecutor must give him or put at his disposal, a copy of the offenses and arrests report prepared by the police. Furthermore, once the hearing has commenced, the accused has the right to have the magistrate read to him the depositions of the witnesses examined during the investigation.

In brief, the aforementioned instances are points of coincidence between our preliminary hearing and the

one conducted in California. Nevertheless, even in those points of apparent coincidence there are distinctions important to emphasize.

As to the right of the accused to present proof in his behalf, we have found that "it is not unrestricted". Due to the "limited nature of the preliminary hearing", once the prosecution has presented sufficient proof to comply with the required quantum for finding the prima facie existence of probable cause to accuse, the accused does not have the right to present and examine, as his witnesses, witnesses announced, but not presented by the prosecution. Pueblo v. Rodríguez Aponte, supra.[31] This conclusion

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[31] In Pueblo v. Rodríguez Aponte, 116 D.P.R. 653 (1985), the defense requested from the District Court that eleven (11) witnesses be summoned, out of

is in tune with our indication that the preliminary hearing "is not, nor should it be converted into, a 'mini-trial' or preliminary trial". Pueblo v. Rodríguez Aponte, supra, pp. 667-668.[32]

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which, ten (10) appeared on the back of the complaints as prosecuting witnesses. The court granted said request.

[32] Notwithstanding the above, we also stated that:

> "In appropriate cases, the judges are discretionally empowered, in the preliminary hearing, to attend to any genuine claim from an accused, on the grounds that a determined prosecuting witness may contribute evidence that would exclude the finding of probable cause. That is an inherently judicial function. Not even the most limited, nor the most broad, view of the preliminary hearing is an impediment for a remedial determination if the prosecution has acted in bad faith by announcing as its own a witness that, knowingly, could benefit the defense.

This is a prerogative must be preceded by careful reflection according to the context of each case. Its exercise is conditioned.To that effect, when at the preliminary hearing an accused

On the contrary, in 1986, at the time

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claims a witness included on the back of the complaint as a prosecuting witness, he shall make a prima facie showing that the witness can contribute exculpatory evidence which, reasonably and with all probability, would defeat the consideration of probable cause for indictment. Cf. Pueblo v. Cancel Hernández, 111 D.P.R. 625 (1981). A simple allegation is not enough. 'The accused does not have a right to go on a fishing expedition to the files of the prosecutor's office.' Pueblo v. Romero Rodríguez, 112 D.P.R. 437 (1982). After the showing, it then corresponds to the judge to examine, in the absence of the parties, that witness' sworn statement. Rather than simple contradictions and unimportant omissions-- matters that properly pertain to the credibility assessment process at the trial, on its merits-- the examination will deal with the elements of the offense and the probabilities that the accused committed it. If in fact, through the examination he is convinced that the prosecuting witness could contribute proof that would acquit the accused, by exception, he shall order the he testify. If such is not the case, the judge shall deny the defense's request to use the prosecuting witnesses." Pueblo v. Rodríguez Aponte, pp. 669-670. (Supplied emphasis).

the Press-Enterprise II opinion was issued, the California code expressly established that, once the presentation of the prosecuting witnesses ended, all witnesses presented by the defense should be sworn and examined. California Penal Code, Section 866.[33]

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[33] It was not until 1990 that, through an amendment, changes were made in Section 866. In its present form this section provides that when the accused present his witnesses, at the request of the prosecutor, the magistrate shall require a proffer of proof concerning the testimony expected by (sic) those witnesses. The magistrate shall not allow any witness unless the proffer of proof shows that the testimony would have the reasonable probability of establishing an affirmative defense, denying some element of the imputed offense or impeach the testimony of any of the prosecuting witnesses. Notice that in California, after the amendment, it is provided that all witnesses presented by the defense must be sworn and examined and, only upon the request of the prosecutor, the magistrate shall request a proffer of proof concerning the testimony of said witnesses. In our jurisdiction not every witness presented by the accused will be

Another distinguishing element in apparently similar matters in both hearings, is that of the right of the accused to receive copies of the sworn statements of the prosecuting witnesses. In our jurisdiction the standard that prevails is that which provides that the prosecutor shall place at the disposal of the accused the sworn statements of the prosecuting witnesses who have testified at the preliminary hearing. Now then, it is not only the statements of those who have testified at the hearing, but also

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examined. We have resolved that the accused does not have the right to present as his witnesses the prosecuting witnesses not presented by the prosecutor. These will be admitted, discretionally and only by exception, after the judge examines the sworn statements from those witnesses when the accused makes a "genuine claim" that the prosecuting witness would contribute proof that would exclude the determination of probable cause. Pueblo v. Rodríguez Aponte, supra.

those that he has in his possession and only when the accused so requests it. Rule 23(c) of Criminal Procedure, supra. In California, on the contrary, the code provides that upon the commencement of the preliminary hearing, the magistrate shall read to the accused the depositions of the witnesses examined during the investigation. California Penal Code, Section 864.

In California, at the time Press Enterprise II was decided, the Rules of Evidence applied to the preliminary hearing. McDaniel v. Superior Court for County of San Diego, supra. In our jurisdiction we have not understood as necessary passing judgment at to whether the matter of the Rules of Evidence should apply or not to the procedure followed in the preliminary hearing. That point has

not been resolved. Pueblo v. Esteves Rosado, 110 D.P.R. 334 (1980). As to the application of the Rules of Evidence to our preliminary hearing, Professor Resumil states that "the nature of the preliminary hearing limits their applicability as it concerns a process of an investigative nature. It is not a matter of assessing credibility in the judgment of credibility, but of establishing a causal-factic (sic) relationship between the behavior of the accused and the verification of the elements of the offense". Resumil de Sanfilippo, supra, p. 384.

Another dissimilar aspect to be highlighted, also present in Press-Enterprise II, is the procedure followed in both jurisdictions when in the preliminary hearing it is found that there

is no probable cause to accuse. After a finding of cause, here as well as in California, the magistrate must acquit and release the accused. Rule 23(c) of Criminal Procedure, supra; California Penal Code, Section 871. In California, nevertheless, the prosecutor cannot continue his investigation, he is only allowed to revise matters of law. Now, then, in our jurisdiction, when no probable cause is found, by virtue of the provisions of Rule 24(c) of Criminal Procedure, supra, the prosecutor can go on investigating and he is authorized to present the matter again with the same proof or with different proof before a judge of higher category of the Court of First Instance. As we stated before, the preliminary hearing on appeal is an independent, separate and different

proceeding from the initial proceeding. Pueblo v. Cruz Justiniano, supra; Pueblo v. Tribunal Superior, 96 D.P.R. 237 (1968). If at the preliminary hearing on appeal no probable cause to accuse is again found, the prosecutor shall not be able to request a revision of the decision on the merits there made, and he shall be impeded from presenting the indictment against the accused. As we indicated when discussing the preliminary hearing proceeding in Puerto Rico, he shall only be able to move for review, through a certiorari, of the findings as to the law made at the hearing on appeal. Pueblo v. Cruz Justiniano, supra.[34] If, on the other

[34] Concerning the effects of the determination that a preliminary hearing on appeal be held, Professor Resumil states the following criticism:

"[It] militates against the

hand, probable cause is found after the preliminary hearing, the prosecutor is

application of the impediment to prosecute the fact that the degree of proof necessary for the finding of probable cause does not require that the prosecution discover all the evidence it has available to the effect of sustaining the accusation in a preliminary hearing. That, together with the fact that the discovery of evidence does not occur until after the filing of the indictment, could keep beyond the reach of the prosecution exculpatory evidence which, obtained afterwards, he would be impeded from presenting , remaining the offense unpunished because of the impediment to re-prosecute.

As we see, a sanction of this type should not be imposed on the prosecution, impairing its processal function. It should be defined, through legislation, the scope of the negative determination on appeal, guaranteeing the rights of the accused without imposing a heavy burden on the prosecution that prevents it from re-initiating proceedings that just remained at an investigative phase." Resumil de Sanfilippo, supra, pp. 394-395.

authorized, at his discretion, to proceed to the adjudicative phase through the filing of an indictment. In California, on the contrary, it proceeds immediately to the trial on its merits, since there has already been an arraignment.

In California, once the magistrate finds that there is no probable cause and dismisses the complaint, the prosecutor may resort to the superior court to move for the restoration of the complaint. Said petition shall have as exclusive grounds that, as a matter of law, the magistrate erroneously dismissed the charges. That is how the requirement to record in detail the proceedings held at the original hearing is explained. People v. Salzman, 182 Cal. Reptr. 748 (1982). Contrary to what happens in our jurisdiction, the California prosecutor

cannot move on appeal for a new, different and independent preliminary hearing.

In California, if the superior court affirms the magistrate and refuses to restore the complaint, the prosecutor is empowered to appeal that determination. If, on the contrary, the court grants the restoration of complaint motion and as a result the accused is held to answer, he can move for the revision of that determination. California Penal Code, Section 871.5. For the appeal or revision, as the case be, the can resort to the California Court of Appeal. California Rules of Court, State, West Pub. Co. Rev. ed., 1990, Div. I, Ch. I. If the restoration is allowed the accused can also choose to waive that right and consent to the filing of an indictment,

rather than resuming the proceedings before the magistrate.

On the other part, in California, if the magistra6e finds probable cause, the next step is the hearing on its merits. Under our system, once the preliminary hearing on appeal ends, if the court finds probable cause, the prosecutor still has discretion to file, or not, an indictment.

We have discussed specific instances that show some of the most notable differences that exist between the California preliminary hearing and ours. An examination of the California preliminary hearing which we included in Part III of this opinion shows us other of the differences between both hearings. As an example we can highlight the detailed procedure to be followed concerning the

subject of witnesses and the aspects pertaining to their presentation, protection and exclusion, among others.

The above makes us conclude that our preliminary hearing, contrary to the one conducted in California, is a limited proceeding, of an investigative judicial nature, that does not sufficiently resemble a trial as to be applicable what was resolved in Press-Enterprise II.

VIII. THE PARTICULAR NATURE OF OUR PRELIMINARY HEARING ACCORDING TO OUR LAW SYSTEM- EXPERIENCE AND LOGIC AND THE QUALIFIED RIGHT OF ACCESS OF THE PRESS AND THE PUBLIC TO THE PRELIMINARY HEARING

After establishing that the case of Press-Enterprise II does not apply to Puerto Rico, since our preliminary hearing

is not similar to that of California, nor sufficiently similar to a trial, it now behooves us to determine, by using the experience and logic analysis, taking into consideration the proceeding and the place where it is conducted, whether the press and the public have a First Amendment right of qualified access to the preliminary hearing.

In Gannet, pp. 377-388, the federal Supreme Court recognized that, concerning pretrial proceedings, there did not exist persuasive evidence of the existence of a right at common law, of a right on the part of the public to attend them. Those proceedings, in order protect, precisely, the right to a fair trial, were characterized by the same degree of openness as the trial itself. In Puerto Rico, history shows that the proceedings

of the investigative penal stage were not open to the public either.

The experience analysis is nothing else but a historical analysis of the proceeding under study. As we stated previously in Part V of this Opinion, Puerto Rican criminal procedural law historically has developed in a very particular manner due to the influence of civil law and angloamerican common law. Specifically concerning the preliminary hearing, we must point out that although it has a brief tradition, since it went into effect in the middle of 1964, it had as background an obtained nourishment from a process of analysis of various law systems which led us to the approval of one of the most advanced constitutions of the modern world, adapted to our historical needs and historical reality.

Concerning the procedural mechanism under study, arising from the Angloamerican common law, we only adopted the preliminary hearing basic concept. The closure characteristic which differentiated it from the trial itself, was incorporated into it by us, in order to make it more compatible to our procedural penal and constitutional law, which specifically consecrates the inviolability of human dignity and the right of every person to be protected against abusive attacks against his honor, reputation and private or family life. Article 2, Sections 1 and 8 of the Constitution of the Commonwealth of Puerto Rico.

We have designed the nature and form of the preliminary hearing in the light of our juridical reality and idiosyncracy as

a people. Its present boundaries are the product ofjurisprudential interpretations nourished by experience and the juridical assemblage bequeathed by our civilist tradition, the constituents and other legal scholars. In truth, history reflects that access of the public to the preliminary hearing in Puerto Rico has not played a significant role in its development.

Penal procedural law has been defined thus: "An area within the public law which consists of a collection of statutory provisions and jurisprudential decisions,whose purpose is to regulate the process through which the State identifies, prosecutes and penalizes the person who has committed an offense. It also includes, then, the study of the organizations, functions and procedures

through which the State complies with the objectives of justice. Thence that its primary objective be to channel the fair processing of the controversies of a penal nature." (Supplied emphasis). Nevares-Muñiz, supra, p. 1.

The penal process is properly divided into three phases: (1) the investigative judicial function, in which the State identifies the offense and the person who probably committed it; (2) the adjudicative stage in itself, with all its adjunct proceedings, in which the States prosecutes; and (3) the proceedings after sentencing in which the State penalizes.[35]

[35] See "Diagrama de la secuencia procesal y sinopsis de las instituciones procesales correspondientes", Resumil de Sanfilippo, supra, Accumulative Supplement 1991. (Translators note: "An Analysis of Procedural Sequence and Synopsis of the Corresponding Procedural Institutions").

The investigative or instruction phase "includes, from the immediate investigation at the scene of the acts, up to the formulation of charges and the arrest which initiates the penal action". Nevares-Muñiz, supra, p. 4. In the case of a felony,[36] "the investigative stage culminates with a probable cause to accuse hearing." Resumil de Sanfilippo, supra, p. 369.

Professor Resumil classifies the preliminary hearing as an investigative judicial mechanism whose purpose is to determine " with greater probability the connection of the accused with the

[36] Concerning the right to a preliminary hearing, " the term 'felony' refers to the legislative classification, independently from the seriousness of the set penalty for the imputed offense or of sentence expectative". Resumil de Sanfilippo, supra, p. 370.

commission of the offense". Ibid, p. 371. It is a way to spare "the accused from procedural humiliation and the anxieties that the adjudicative stage of a criminal proceeding causes...it is one more guarantee of the constitutional right of the presumption of innocence that every person accused of an offense has according to our Constitution". Ibid. See also Pueblo v. Rodríguez Aponte, supra, p. 665.

The presumption of innocence is a sacred principle of penal law. An individual accused of an offense faces grave social and personal consequences, including the potential loss of physical freedom. He is also subject to social stigmatization, to ostracism from his community, as well as to other damages of social, economic and psychological nature.

In the light of the seriousness of these consequences, the presumption of innocence is crucial. It ensures that, until the State proves the guilt of the accused beyond a reasonable doubt, the person is innocent. This is crucial in a society with a commitment with social justice. J.C. Morton and S. C. Hutchinson, The Presumption of Innocence, Canada, Carswell, 1987, p. 6.

Concerning the inclusion of that right in our Constitution, the Constitutional [Convention] stated that:

> "The presumption of innocence is a standard so ensconced in our judicial proceedings that we recommend its constitutional statement, rather with the purpose of recognizing that reality and not of creating new rights. It is part of our unwritten Constitution." 4 Diario de Sesiones de la Convención Constituyente, 1951, p. 2569.(Translator's note: Daily Sessions Record of the Constitutional Convention.)

Its importance has been recognized in other jurisdictions, as for example, Spain, where it has also been included in the Constitution. Concerning this, it has been stated that this is "a fundamental vinculative right for all citizens, with a clear normative procedural content that should be respected by all and the watch of which corresponds to the Courts of Justice." E. Romero Arias, La presunción de inocencia, Pamplona, Editorial Aranzadi, 1985, p. 127.

The presumption of innocence is a right of ancient ancestry. As early as the XIVth century, it was established that in cases where there is doubt, one opts to save rather than condemn. In modern times, the fear of unjust convictions has led to state that it is preferable that ten guilty persons escape rather than have an

innocent one suffer. Thus the origin of the principle of basic justice that demands that each of the elements of the offense be proved. It is the fear of erroneous convictions what has led to establish the reasonable doubt requirement.

It is not enough simply to know the origin or basis for the presumption of innocence. Because of this, a more practical definition has been outlined. The presumption of innocence, in truth, is merely another form of expression for a part of the accepted rule of the burden of proof in penal cases, the rule that establishes that it is the accused who has to produce the evidence to persuade beyond reasonable doubt. Morton and Hutchinson, supra, pp. 4, 6, 7.

Therefore the presumption of

innocence is a fundamental right. That is why it has been stated that:

> "Sacred it is, undoubtedly, the cause of society, but no less so the individual rights...and if the interest of the inhabitants of the land is to assist the State in exercising most freely one of its most essential functions, that of punishing the violation of the penal law so as to restore, there where it be disturbed, the harmony of the law, not because of this should ever the presumption of innocence be sacrificed, because , in the end, a well understood social order is no more than the conservation and reciprocal respect of all the individual rights." Romero Arias, supra, p. 24.

The preliminary hearing, as it functions in Puerto Rico, is a simple procedural mechanism, compared to that of California. It was created for the benefit of the accused and for interposing the judge, the judicial arm, between the prosecution and the accused. If the State does not show that it has a minimum of

evidence, a "scintilla", on which to support a prima facie determination that an offense was committed and that with all probability the accused committed it, he shall not be prosecuted. This show of a minimum sufficiency of evidence that is demanded from the prosecution before a person can be indicted, prevents unjustified procedural humiliations, protects the person's reputation and dignity, protects his/her right to a fair and impartial trial and constitutes one more guarantee of his constitutional right to a presumption of innocence. In other words, the prosecution must show that it has a minimum of proof before it is allowed to initiate that phase in the criminal process directed at rebutting the presumption of innocence, the filing of the indictment.

The private preliminary hearing has the finality of preventing that a citizen be unjustifiedly subjected to the severity of the adjudicative phase of a criminal process, which would extremely onerous for the accused citizen as well as for The State. Pueblo v..López Camacho, supra; Pueblo v. Rivera Alicea, supra. All this, without turning it into a "mini-trial".

Furthermore, it protects the right of every accused to receive a fair and impartial trial. This right also arises by mandate of the constitutional provisions concerning the right of every accused to due process of law and to an unbiased judge. Art. II, Secs. 7 and 11, Constitution of the Commonwealth of Puerto Rico; Pueblo v. Robles González, Op. of March 19, 1990, 125 D.P.R.---(1990); 90

J.T.S. 41, p. 7583; Pueblo v. Martin Aymat, 105 D.P.R. 528, 534, (1977). The essential guarantee in the due process of law is that of fairness. Rotunda et al., Treatise on Constitutional Law, St. Paul, Minnesota, West Pub. Co., 1986, Sec. 17.8, p. 250.

We have frequently used the phrase "fair and impartial" since early in this century. Ex-parte Acevedo et al., D.P.R. 275, 287 (1902. Even though it does not appear literally in our Constitution, this phrase summarizes the fundamental notion that all judicial proceedings be conducted with justice, that is, to give each person what is fit, and with impartiality, that is to say, with the absence of favoritism or prejudice towards the parties involved. In the context of the criminal process, the phrase "fair and impartial trial"

includes all those rights and guarantees provided by the Constitution that protect the citizenry against possible arbitrariness from the State, such as the right to a public and speedy trial, the right to confront prosecuting witnesses and to a presumption of innocence. See Art. II, Sec. 11, Constitution of the Commonwealth of Puerto Rico. This phrase has been incorporated to Rule 81 of Criminal Procedure, supra.

In relation to the trial in a criminal case, we have pointed out that the "publication of news concerning the judicial proceeding does not constitute by itself a violation of the right of the accused to a fair and impartial trial", a right which has the same constitutional hierarchy as that of freedom of the press. Pueblo v.. Pérez Santaliz, 105 D.P.R. 10,

14 (1976), Pueblo v. Maldonado Dipiní, 96 D.P.R. 897 (1969).[37]

Now then, by the way and manner in which the preliminary hearing is conducted in Puerto Rico and by the fact that it is held at the investigative judicial stage, opening to the public could have serious repercussions for the right of the accused to a fair trial. The damaging publicity would originate at the investigative judicial stage where the accused faces a

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[37] In order to show that publicity has been prejudicial to the right of the accused, he has to prove affirmatively and satisfactorily" that "it was of such nature, impact and exposure", that it deprived him of his right to a fair and impartial trial". Pueblo v. Lebrón González, supra, p. 86. The possibility of prejudice can arise "when the publicity is biased, inflammatory, derogatory, or so intense that an environment of passion against the accused could reasonably be inferred". Pueblo v. Pérez Santaliz, supra, p. 15.

proceeding in which the quantum of proof to show the existence of probable cause is a mere "scintilla". It is only required that there be sufficient proof to determine that a prima facie case exists; the inculpatory evidence may be of a totally inadmissible nature at the trial; and the opportunity of the accused to present evidence may be limited. Pueblo v. Rodríguez Aponte, supra; Gannet, p. 378.

The display in the media of this type of information makes difficult that a fair and impartial trial be held. It is not only a matter of the contact that the jury might have with prejudicial publicity during the development of the trial. The adverse publicity during this investigative stage greatly reduces the number of ideal candidates to become the

judges of the facts, persons who act with total impartiality and righteousness. It also makes difficult the corrective measures that might be taken to avoid the prejudicial effects of publicity.[38] Rule 121(e) of Criminal Procedure, 34 L.P.R.A. Ap.II. We are not facing speculation, but a reality, above all in our jurisdiction "where the area is reduced and the population is dense, served by communication and diffusion media of maximum efficiency, for which reason it would be impossible to have a totally

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[38] At the trial level there are corrective measures to minimize the adverse impact of the prejudicial publicity on the right of the accused. Among these, the sequestration of the jury, giving remedial instructions, the suspension of the proceedings, or ordering transfer to another courtroom. Pueblo v. Hernández Mercado, Op.of May 21 of 1990, 126 D.P.R.___(1990), 90 J.T.S. 74, p. 7791.

uninformed and not- knowing jury". Pueblo v. Tursi, 105 D.P.R. 717, 720 (1977). The excessive case publicity prejudicial to the accused makes difficult the selection of an impartial jury and having a fair trial." Pueblo v. Hernández Mercado, Op. of May 21, 1990, 126 D.P.R.___(1990), 90 J.T.S. 74, p. 7790.

If the preliminary hearing as it is conducted at present in Puerto Rico ,were opened to the press and the public the candidates for jurors would be more prone to be affected in their objectiveness. They would be in contact, not only with general information about the case but also they could have access to inculpatory information inadmissible in the trial, besides being aware, beforehand, of part of the proof that the prosecutor and the accused have.

It must also be pointed out that, since the Rules of Criminal Procedure require that the preliminary hearing be set in a relatively short lapse of time after the arrest,this would frequently make it impossible for the accused to show the existing prejudice in his case or the need for a closed preliminary hearing in order to have a fair trial. Opening to the public the investigative criminal procedure at the preliminary hearing stage could only have the undesirable result that the accused, on occasion, be placed in the position of having to defend his reputation in the face of evidence that does not even get to establish a prima facie case against him.

The preliminary hearing in Puerto Rico is a procedural mechanism created for the benefit of the accused in order to

avoid subjecting him to a full criminal trial if the quantum of proof required to find probable cause is not reached. In this manner, not only the presumption of innocence is protected, but also the privacy and dignity of the accused. Every measure that protects and reinforces the right of the accused to the presumption of innocence, and from being unjustifiedly exposed to the loss of his privacy and dignity, in the balance of interests should incline in his favor. For the accused, above all the one who is finally acquitted at the preliminary hearing, this turns out to be onerous. Among other things, due to the impairment of his presumption of innocence and because of the stigma that entails being accused of the commission of an offense, without the presentation of not even a

"scintilla" of proof to show, prima facie, that the offense was committed and that he was the one who committed it. Such stigma by itself is enough to make him feel maligned as a person in his inner conscience, before society. His dignity as a human being is wounded and he is exposed to public rejection.

No person relinquishes his human, civil and constitutional rights by the mere fact of being accused of a legal transgression. The accused continues to deserve, among the many rights that assist him, that of privacy and that his dignity be respected. Article II, Sections 8th and 1st of the Bill of Rights of the Constitution of Puerto Rico.[39]

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[39] As pertinent, these provisions indicate the following:

Section 1: "Human dignity is

inviolable."

Section 8: "Every person has a right to the protection of the law against abusive attacks against his honor, his reputation and his private or family life."

Both rights are related between themselves. Therefore,it is inferred, from what was pointed out during the presentation of the Report of the Bill of Rights Commission of our Constitutional Assembly, which preceded (sic), the inclusion of said Bill as an integral part of the Constitutional Law, when, concerning the Art. II, Sec. 1 of the Constitution, the following was stated:

> "The purpose of this section is to clearly establish, as a constitutional basis for all that follows, the principle of the dignity of the human being, and as a consequence of this, the essential equality of all persons within our constitutional system". 4 Diario de Sesiones de la Convención Constituyente de Puerto Rico, 1951, p.2561. (Henceforth, Diario de Sesiones...)

In relation to Article II, Sec. 8, of the Constitution, and its relationship to with Sec. 1, it was stated that:

As opposed to what happens in the United States, where the right to privacy has an uncertain origin, this has been consecrated in our Constitution with all clarity. Figueroa Ferrer v. E.L.A., 107 D.P.R. 250, 260 (1970). This right which acquired constitutional rank in our jurisdiction long before than in the North

> "The protection against attack to the honor, reputation and private life also constitutes a principle which complements the concept of human dignity sustained in this constitution. It has to do with the personal inviolability in its most complete and ample form. Honor and privacy are values of the individual that deserve full protection, not only before attempts emanating from other individuals, but also against abusive interference on the part of the authorities." 4 Diario de Sesiones..., p. 2566.

As we can see from the foregoing, the right to privacy contained in Article II, Section 8, of the Constitution is contained in and is a complement of the most comprehensive conception of "human dignity."

American jurisdiction, emerges expressly from Article II, Section 8, which arises, in turn, from Article V of the American Declaration of the Rights and Responsibilities of Man, and Article 12 of the Universal Declaration of Human Rights. E.L.A. v. Hermandad de Empleados, 104 D.P.R. 436, 439 (1975); Cortés Portalatín v. Hau Colón, 103 D.P.R. 734, 738 (1975).

The right to privacy has been the object of ample discussion in our jurisprudence. Regarding the reason for including it in our Constitution, we pointed out in E.L.A. v. Hermandad de Empleados, supra, pp. 439-440, the following:

> "The recognition of the right to privacy in the Constitution of Puerto Rico basically obeyed to two factors. Acting in response , in the first place, to a concept of the individual deeply rooted in our culture...

> "In the second place, it was wanted to formulate a broader Bill of Rights than the traditional one, which would collect common notions from diverse cultures about new categories or rights."

In relation to this, the Civil Rights Commission of Puerto Rico expressed that in order to solve the instant controversy, "it must be considered that in the sphere of our Puerto Rican laws, the right to privacy has a more ample constitutional protection." Boletín de Derechos Civiles, Year 1992, No. 1, page 4.

It is this dual basis which provides a different strength to our right of privacy which allows us to extend it an apply it, with unquestionable validity, to unthought situations under the North American constitutional provisions.

Its firm roots in the culture of our people is the most clear expression that

"the right of privacy has a very high place in our scale of values". E.L.A. v. Hermandad de Empleados, supra, page 445. This, together with its recognition at the international level as one of the most fundamental rights of the human being, has attained for the right of privacy a level of primacy in our Bill of Rights. P.R. Tel Co v. Martínez, 114 D.P.R. 328 (1983). Due to its nature and importance, the constitutional provisions that recognizes the right of privacy, does not needs legislation to establish it, it works ex propio vigore and can be enforced not only before the state but also amongst private persons. Colón v. Romero Barceló, 112 D.P.R. 573 (1982); Alberio Quiñones v. E.L.A., 90 D.P.R. 812 (1964); González v.

Ramírez Cuerda, 88 D.P.R. 125 (1963).[40]

Thus, we, as the final interpreters of the Constitution, have recognized the right of privacy as one of the most precious "in the life of every human being in a democratic society", a constitutional right which has "the most highest rank and {constitutes} a crucial dimension within the human rights". Arroyo v. Rattan Specialties, Inc., 117 D.P.R. 35, 56, 62 (1986).

In relation to the high place that the right of privacy has within our constitutional scheme, in order to understand its privileged character it suffices to examine what was expressed in

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[40] The federal Supreme Court in Press Enterprise II, supra, pages 511-512, recognized the duty to protect within the context of a criminal trial, the right of privacy of the jurors.

P.R. Tel. Co. v. Martínez, supra, page 339, when we stated:

> "So transcendental is this right in our society that, in the occasions in which it has been opposed to others of the same rank, it has emerged victorious from the constitutional confrontation. Thus, for example, it has prevailed over the following fund amental rights: freedom of expression, Hermandad de Empleados, supra, (picke t in front of the Department of Labor Secretary's house); freedom of religi on, Sucn. de Victoria[v. Iglesia Petecostal, 102 D.P.R. 20 (1974)], (religious services which transcend to the neighborhood); and of property, Torres v. Rodríguez, 101 D.P.R. 177 (1973) (establishment of a funeral pa rlor in a residential zone) [Arroyo v. Rattan Specialties, Inc., supra (use of the polygraph to corroborate the information given by an employee to his employer and to make sure that it is true and correct in order to avoid damage to his property or that it be stolen)]. It has also prevailed over the limiting legislation of the decision that, the spouses who by mutual consent decide to disolve their marriage. Figueroa Ferrer, supra."

According to all the aforestated we have resolved that, "[i]n the absence of special circumstances which configure

compelling interests of the State, our society requires that we incline the scale in favor of the protection of the [the right] of privacy..." Arroyo v. Rattan Specialties, Inc., supra, page 63.

On the other hand, we have also recognized that "[t]he citizens in a society governed by itself must posses the legal right to examine and investigate how their affairs are conducted, subject only to those limitations imposed by the most urgent public need". Dávila v. Spte. de Elecciones, 82 D.P.R. 264, 279 (1960). In relation to documents in the possession of the Executive Branch, in Soto v. Srio. de Justicia, 112 D.P.R. 477, 495 (1982), we resolved that, by way of exception, the Legislative Assembly could approve legislation to remove [them] from public scrutiny, but "[s]aid legislation as well

as any other that affects fundamental rights, has to fully justify itself and contain clear and precise norms that allow to identify adequately the material and the circumstances in which the norm of accessibility is to be applied". In Santiago v. Bobb y el Mundo, Inc., 117 D.P.R. 153, 159 (1986), we expressed that "the secretiveness in public matters is an exception not the norm".

We are, then, before two fundamental constitutional rights, the right to freedom of expression and the right to privacy. Our legislator, acknowledging the necessity to protect every citizen who faces a criminal process because of a felony of possible abuses, wanted to interpose between the judicial investigative stage and the adjudicative one, a mechanism, simple but effective, to

avoid that a person could be submitted to the severity of a criminal trial with all the inevitable detrimental consequences to his right of presumption of innocence, to his dignity and privacy and his right to a just and impartial trial without the State even having a quantum of minimum evidence to sustain a prima facie determination of probable cause. If probable cause is not determined, the State is not allowed to file the indictment questioning the presumption of innocence ofnthe accused. The legislative intention was, in this investigative preliminary stage of the criminal process, to protect the citizen who has a right to the presumption of innocence, from the severity of an unjustified accusation without any evidentiary basis. To achieve this legislative purpose, Rule 23(c) provides

that the preliminary hearing shall be private, except when the accused, upon its commencement, requests that it be open. Clearly, in those cases in which the accused himself, by his acts and behavior has implicitly waived this protection, or when the particular circumstances of the case make it unnecessary that it,in order to fulfill the legislative purpose, be private, the preliminary hearing shall be opened to the public even without the consent of the accused. consent.

After all, "the purpose of the interpretation [of a law] is to enable that the intended purposes of the legislator be fulfilled, the laws should be interpreted and applied in communion with the social purpose that inspires them. They should not be detached from the human problem whose solution they seek

nor should they be disembodied from the realities of life which society itself has projected on them, the desire for justice that generates them would turn illusory and it would be lost in a vacuum". Figueroa v. Díaz, 75 D.P.R. 163, 171 (1953); García Pagán v. Shiley Caribbean, Op. June 30, 1988, 121 D.P.R. ___ (1988), 88 J.T.S. 101; Pueblo v. Pizarro Solís, Op. January 31, 1992, 130 D.P.R. ___ (1992), 92 J.T.S. 10; Zambrana Maldonado v. E.L.A., Op. January 30, 1992, 130 D.P.R.___(1992), 92 J.T.S. 12; Calderón Morales v. Adm. de los Sistemas de Retiro, Op. February 26, 1992, 130 D.P.R. ___ (1992), 92 J.T.S. 21. "[W]hen fulfilling our task [of interpreting the laws] the judges can not consider the laws isolatedly, like pronouncements of abstract principles or like measures

formulated to satisfy the ephemeral problems of the moment. We have the duty to make the law serve useful purposes and to avoid an interpretation so literal that it leads to absurd results". (Emphasis supplied). Pacheco Rodríguez v. Vargas, 120 D.P.R. 404, 409 (1988); Passalacqua v. Mun. de San Juan, 116 D.P.R., 618, 632 (1985); P.R. Tel. Co. v. Martínez, 114 D.P.R. 328 (1983).

It must be borne in mind that the preliminary hearing establishes a procedure directed to the limited purpose that a magistrate determine whether the prosecutor has at least a minimum of evidence that justifies that the process continue and that an indictment be presented. Once the judge is convinced that this minimum of evidence exists, he can, without listening to testimony or

proof of the defense, determine probable cause. The privacy of the hearing is the most effective means that the State possesses to protect the right to the presumption of innocence, to a fair and impartial trial and to the privacy of a person at this judicial investigative stage of the criminal process. To keep the preliminary hearing private promotes a fair and impartial trial and provides an additional guarantee to the constitutional right of the presumption of innocence.

Though we recognize the benefits which opening the complete criminal process to public scrutiny might entail, we are of the opinion that even though we are facing a legitimate fundamental interest, in the balance of interests, the damage that this could cause to the right of every accused to a fair and impartial

trial, to the presumption of innocence and to the protection of his reputation and dignity as a human being, justify that the preliminary hearing, as it is conducted at present in Puerto Rico, be private, as a general standard, except that the accused, at the commencement thereof, request that it be open, or that by his acts or conduct it can be understood that implicitly he has waived it or that due to the particular circumstances of the case, the right whose protection is attempted, is not present.

IX. CONCLUSION

To summarize, there is no doubt, that in the trial itself and in all the procedures of the adjudicative stage, there exists a constitutional right of the public and the press of limited access under the First and Fourteenth Amendments

and a right of the accused to a public trial under the Sixth and Fourteenth Amendments. Richmond; Globe; Press-Enterprise I; Press-Enterprise II; Waller; Gannett. Nevertheless, when one is in the presence (sic) of a proceeding in the judicial investigative stage of the criminal procedure, the federal Supreme Court has not yet determined that this constitutional right of the press and the public of limited access exists under the protection of the First Amendment. We have not found any case at the federal Supreme Court of the United States level in which this constitutional issue has been posed.

Experience and logic do not guarantee the conclusion that the public and the press are assisted by a constitutional right of limited access to

the preliminary hearing as it is conducted and as it functions in Puerto Rico.[41] In our jurisdiction the preliminary hearing is held against an accused and prior to the arraignment, very different from what happens in California, where the preliminary hearing is held against a defendant, that is, after the arraignment.

Making a balance of interests, between the rights to a fair trial, of

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[41] It may be noted that even though the controversy about if the preliminary hearing has or has not to be open has generated great publicity and discussion, our legislature has not rejected it. Now then, if in the future it would be decided as a public policy, to amend Rule 23(c) of Criminal Procedure, the form and way in which it is actually conducted would have to be revised in order to avoid affecting fundamental constitutional rights of the accused to the protection of his dignity and "against abusive attacks to his honor, his reputation and his private or familiar life".

protection of every person as to his dignity and "against abusive attacks to his honor, his reputation and his private or family life" and to be assisted by the presumption of innocence, on one side, and the right of the public and the press to be informed, we understand, that under the specific circumstances covered by Rule 23(c) of Criminal Procedure, the former weigh more and should prevail. The press and the public, once the barrier of the minimum of evidence that is required to determine probable cause at the preliminary hearing is overcome, will have a right to limited access to the criminal adjudicative process, according to the jurisprudential norms under the protection of our Constitution and of the Federal Constitution.

Wherefore, the appealed judgment is hereby affirmed, issued by the Superior Court, San Juan Part on January 29, 1990. Judgment shall be issued according to the stated in this opinion.

(Sgd.)

MIRIAM NAVEIRA DE RODON

Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

(No. AC-90-181 - APPEAL)

El Vocero de P.R. (Caribbean Int. News Corp.) et al.

Appellants

v.

The Commonwealth of P.R. et al.

Appellees

Dissenting opinion issued by Mr. Associate Justice HERNANDEZ DENTON, in which he was joined by Mr. Associate Justice NEGRON GARCIA.

San Juan, Puerto Rico, July 8, 1992.

We are again facing the claim from the press for access to pretrial criminal proceedings.[1] Until this decision we had

[1] We take judicial notice that in Pueblo v. Jarabo, CE-92-52, we denied the certiorari petition of the accused questioning the decision of the Superior Court to allow access of the press to the hearing for determining cause for arrest under Rule 6 of Criminal Procedure. Be means of the resolution of February 3 of 1992, we issued the following resolution:

"Having considered the particular circumstances of the extensive exposure

always favored opening the judicial

and public disclosure to which the petitioner voluntarily subjected himself, and in the light of the rights concerned, the petition is hereby denied.

"Be it notified by mail and telephone.

Agreed by the court and certified by Mr. General Clerk. Mr. Associate Justice Rebollo would simply provide a "No Cause" to the remedy requested. Mr. Associate Justice Hernandez Denton, in view of the importance of the constitutional interests in conflict, the freedom of the press and the right to privacy, would paralyze the proceedings at the court of instance and would issue (sic) with the purpose of setting the proper standard that should be followed in the future. Due to the aforementioned considerations I would shorten the regulatory terms and would give priority attention to the Resolution of the instant controversy."

On the other hand, in El Vocero de Puerto Rico v. Hon. Carlos Caban Garcia, MD-92-1, we denied a mandamus in the original jurisdiction presented by El Vocero newspaper and we ordered the transfer of the matter to the Superior Court, San Juan Part. On February 3, 1992, the Superior Court (Hon. Angel Hermida) ordered the court, where some charges against Jarabo were being seen, to grant a hearing to the newspaper before resolving whether the hearing should be public or private.

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proceedings to the public and the press to promote the pureness of the system and to strengthen the people's confidence in this judicial branch. The opinion of the majority changes this decisional course and confirms a procedural law that infringes Section 4 of the Bill of Rights of the Commonwealth of Puerto Rico and the First and Fourteenth Amendments of the Constitution of the United States. Since the preliminary hearing regulated by Rule 23 is, in many cases, the sole occasion in which the people can observe what transpires in the criminal proceeding, we would open the doors of the courts to allow the public and the press to be present. We dissent.

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The instant controversy requires that we weigh the constitutional rights which every accused has to a fair and impartial trial against the press and the public's right to witness criminal proceedings. Today we ratify our pronouncements in Pueblo v. Hernandez Mercado, resolved on May 21, 1990, 126 D.P.R._____ (1990), concerning the function of the press in our country:

> Our doctrine starts from the premise that the publication of news about criminal proceedings keeps the public informed about matters of public interest and that there exists a fundamental right of the press to publish what transpires in the criminal justice system . . . In times when criminality affects the peace and tranquility of all the Puerto Ricans, the press fulfills an eminently social function by disclosing information concerning the judicial cases.

I.

The petition for access to the preliminary hearings, presented by El Vocero is based on the constitutional right of freedom of the press and of expression guaranteed by our Constitution as well as by that of the United States. Even though the guarantees of the First Amendment of the Constitution of the United States set the minimum content of the rights in Puerto Rico, Aponte Martinez v. Lugo, 100 D.P.R. 282, 287 (1971), our Court has imparted a broad and robust dimension to the freedom of expression consecrated by Section 4 of Article II, of the Constitution of the Commonwealth of Puerto Rico. With a more comprehensive and protective vision of the right of freedom of speech and of the

press, we have recognized that a citizen has a constitutional right to examine the information that the government possesses, subject only to those limitations that demand from the government the most compelling interests. Soto v. Srio. de Justicia, 112 D.P.R. 477, 485 (1982).

The clear tendency in favor of the disclosure of public information was initially expressed in Sierra v. Tribunal Superior, 81 D.P.R. 554 (1959), continued in Davila v. Superintendente de Escuelas, 82 D.P.R. 264 (1960), culminated in Soto v. Srio. de Justicia, 112 D.P.R. 477, 485 (1982), and ratified in Santiago v. Bobb and El Mundo Inc., 117 D.P.R. 153, 159 (1986) and Lopez Vives v. Policia de P.R., 118 D.P.R. 219 (1987).

In Soto v. Secretario de Justicia, supra, p. 495, we established that "every legislation that seeks to conceal information from a citizen under the mantle of confidentiality shall be interpreted restrictively in favor of the right of the people to keep informed. Said legislation, like any other that has a bearing on fundamental rights, must be fully justified and contain clear and precise standards that allow to identify . . . the circumstances in which the standard of accessibility will be applied."

In Lopez Vives v. Policia de. P.R., supra, p. 228, in scholium 7, we affirmed that the cases of Richmond Newspapers Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980), (henceforth Richmond)

and Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982) (Globe henceforth) "does not have the broadness and strength of our pronouncement in Soto v. Secretario de Justicia." In other words, under the mantle of our Constitution, the citizens as well as the press have a constitutional right to obtain information possessed by the government: "Our jurisprudential doctrine has strengthened this constitutional scheme. Nowadays, secrecy in public affairs is the exception and not the rule." Santiago v. Bobb and El Mundo Inc., supra, p. 159.

In the particular case of the judicial proceedings, historically these have been forums opened to the public where regularly matters of great

significance to the public are discussed. As in the United States, in Puerto Rico, by constitutional imperative, trials have been opened to the public. In that way it is guaranteed, not only that citizens be adequately informed of what transpires in the courts, but also it insures that procedural rights be observed and that justice be imparted to all alike.

> The Court of justice is a "theater of justice" where a social drama of vital importance is staged; if the doors are closed, the public will only ask itself whether the solemn ritual of a communal sentence has been performed properly. Tribe, American Const. Law, 2nd Ed., p. 958 (1988).

Furthermore, let us remember that within our constitutional order, the State not only has the duty of protecting human rights, but also of sponsoring and

taking affirmative action to promote the full development of said rights. Trias Monge, Historia constitucional de Puerto Rico, Vol. III, p. 200. The openness of the courts guarantees that the public may observe closely "a certain kind of public drama, a public forum in which to see and to listen, instead of a forum in which to express itself." Tribe, American Constitutional Law, supra, page 965.

That does not mean that this right of access to the judicial processes is absolute. As well as other constitutional rights, this one can be limited by the State if a compelling interest exists that justifies it. Nevertheless, since each case will have singular facts that will be a determining factor when the judicial balance is made, an obligatory

standard of total closure of the court's doors is not justified. Rotunda, Nowak and Young, Treatise on Constitutional Law: Substance and Procedure, Vol. 3, Sec. 20.25.

Among these interests, one of the most important is the right of the accused to a fair and impartial trial. The excess of publicity in a criminal proceedings that is harmful to the accused makes more difficult the selection of an impartial jury and holding a fair trial. Even though in the great majority of cases a conflict between the right of the accused and the press to a fair trial does not arise, it corresponds to the courts to establish the delicate balance between these rights of similar constitutional hierarchy.

Pueblo v. Perez Santaliz, 105 D.P.R. 10 (1976). With the purpose of guaranteeing a fair and impartial trial, we have authorized the courts to take the following measures: (1) an extensive and rigorous voir dire; (2) the isolation or sequestration of the jury; (3) careful and exhaustive instructions in relation to the responsibility of rendering a verdict based exclusively on the evidence presented; (4) removal of the procedures; (5) suspension of the procedures. See also Pueblo v. Lebron Gonzalez, 113 D.P.R. 81 (1982); Pueblo v. Perez Santaliz, 105 D.P.R. 10 (1976); Pueblo v. Echevarria Rodriguez, Op. April 25, 1991.

The same occurs when a conflict with the right to privacy of the accused or of the victim arises. The task is not easy,

but "the courts have the power and the necessary tools to . . . minimize the adverse effects of pretrial publicity." Pueblo v. Hernandez Mercado, res. May 21, 1990.

After examining our jurisprudence and the criteria used when resolving conflicts between the right to privacy and to a fair and impartial trial, and the freedom of speech and the press, let us see the experience in the United States and the doctrine formulated by the federal Supreme Court setting the minimum content of the rights consecrated by the First and Fourteenth Amendments.

II.

The exclusion of the public and the press from criminal proceedings has been

the motive for extensive discussion in North American jurisprudence.

Annotation, Exclusion of Public During Criminal Trial, 48 ALR 2d 1436 (1956); Annotation, Right of Person Accused of Crime to Exclude Public from Preliminary Hearing or Examination, 31 ALR 3d 816 (1970). It was in Richmond, where for the first time a majority of the judges of the federal Supreme Court pointed out that the public and the press have a constitutional right of access to criminal trials under the protection of the First and Fourteenth Amendments. In order to recognize the existence of said constitutional right, it was crucial in the judges' analysis, the fact that, historically, the criminal trial had been public, and, particularly, that this

right assured a fair process. They concluded, besides, that the public character of the trial guaranteed a community therapeutic value.

That is, the fact that the public and the press are present at the trial assures that the people have greater confidence and faith in the criminal justice system, thus dissipating the doubts that ordinarily are generated by a closed proceeding:

> People in an open society do not demand that their institutions be infallible, but it is difficult for them to accept what they are prohibited from observing. Richmond, p. 572.

Two years later, in Globe, the federal Supreme Court concluded that such right of access prevents that the public be excluded during the trial, even in sexual offenses cases.

Furthermore, in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), (henceforth Press-Enterprise I), the federal Supreme Court extended this doctrine to the impanelling process of the jury or voir dire. The high federal forum concluded that a presumption of public trial exists that must be controverted by the person who claims a private process. The court should examine every available alternative before authorizing the closure of the proceedings.

Even though it is characteristic of the jurisprudence previously mentioned the fact that they attend to controversies related to the openness of the trial, on its merits, in Waller v. Georgia, 467 U.S. 39 (1984), (henceforth

Waller), the right of access was extended to the evidence suppression hearing.

Finally, in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), (henceforth Press-Enterprise II), it was concluded that the right of access of the public and the press was extensive to the preliminary hearing. Invoking the same grounds stated in Press-Enterprise I, which made it extensive to the trial and to the jury impanelling process or voir dire, the federal Supreme Court emphasized the presumption of openness to the public that historically manifest itself throughout the criminal proceedings. It also emphasized the therapeutic effect it has for the community to be able to observe the criminal judicial proceedings:

"The value of openness lies in the fact that people not actually attending judicial proceedings can be completely assured that said proceedings are being followed according to standards of fairness; the certainty that anyone can freely attend a trial guarantees that the established procedures are being followed and that any irregularity will come out into the public light. The openness therefore enhances the basic impartiality that should permeate the criminal proceding and the appearance of fairness so essential to the public confidence in the system." Id., p. 13 (Supplied emphasis).

After reminding that one of the ways in which an accused can be guaranteed a fair proceeding is ensuring that the same be public, the federal Supreme Court emphasized that the problem of the First Amendment could not be solved exclusively on the basis of the qualifier which the process receives. The fact that a preliminary hearing is not the same as a

plenary trial does not justify less protection for the constitutional right of access. This is a right sufficiently ample which also extends to the preliminary hearing:

Under the First Amendment, the public in general, and the press in particular have a right of access to the trial and other criminal proceedings. It is a matter of a right implicit in the First Amendment, different from the explicit right in the Sixth Amendment which guarantees the accused a public trial. This right of access is sufficiently ample to extend to the jury selection process, to the preliminary hearing and to an evidence suppression hearing. By virtue of this right of access, the accused does not have an absolute right to waive trial or a private hearing. Even in cases in which the judge, the prosecution and the defense agree to a private trial, the public and the press could oppose and prevail. Chiesa, Derecho procesal penal, Vol. II, Sec. 13.2B(2) (In print). (Emphasis supplied).

Furthermore, in Press-Enterprise II, it was determining the fact that, due to the extensive nature of the preliminary hearing, on occasion it is the last and most important stage of the criminal process. Also, on many occasions it turns out to be "the sole occasion for the public to be able to observe the criminal justice system." Supra, p. 13.

Upon resolving that the pronouncements in Press-Enterprise II are not applicable to Rule 23(c), the majority opinion interprets in a restrictive manner the scope of the First Amendment to the (sic) preliminary hearing in Puerto Rico. In particular, the decision forgets that the decisional main point in all these cases is the presumption of openness of the criminal

judicial proceedings to guarantee, not only a fair trial, but also to promote the "community therapeutic value" and the legality of the decisions.

Having evaluated the applicable jurisprudential norm, it now corresponds to analyze if Rule 23(c) of Criminal Procedure is constitutional.

III.

The preliminary hearing in Puerto Rico is regulated by Rules 23 and 24 of

Criminal Procedure[2] and its Clause (c) provided that:

> " . . . The hearing shall be private unless at the commencement thereof the person requests that it be public."

The text of this provision is clear. In Puerto Rico, by legislative mandate, the hearing is obligatorily private.

Opposite to the experience in the United States, the preliminary hearing was incorporated to our code of criminal procedure in 1964. It is inspired

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[2]With the approval of Law No. 29 of June 19, 1987, Rule 23 was amended with the purpose of facilitating the judicial process. The accused only had the right to a preliminary hearing when he had committed a felony and some circumstances were present. Nevertheless, three years later, through Law No. 26 of December 8, 1990, because it was thought that fundamental rights of the accused were being violated, the legislature amended the law to the effect that every person accused of a felony be guaranteed a preliminary hearing.

basically in its federal equivalent but it takes characteristics, moreover, from the Code of Criminal Procedure in force at that time, the Model Code of the American Law Institute, the Penal Code of California in its procedural part and others. Hernandez Ortega v. Tribunal Superior, 102 D.P.R. 765 (1974).

The scheme of the rule is wide and includes little details. Pueblo v. Rodriguez Aponte, 116 D.P.R. 653, 663 (1985). Although in Puerto Rico the arraignment is subsequent to the preliminary hearing, here, as well as in California, its purpose is "to avoid that a citizen be exposed in an unjustified and arbitrary way to the severity of a criminal process." Pueblo v. Lopez Camacho, 98 D.P.R. 700, 702 (1970). See

also Frattallone Di Gangi, "La vista preliminar;" 63 Rev. Der. Puert., pp. 231, 236 (1977). This objective is based on the theory that the "determination of probable cause for arrest is insufficient, because the denouncer might accuse of an offense without any valid reason, and due to the non-adversative nature of the determination of probable cause for arrest or summons -- which can be done in the accused's absence -- a citizen might be "arbitrarily" submitted to trial for a felony. The result is that it is unfair to expose the citizen to the severity of a trial for a felony without the previous opportunity of an adversative hearing that justifies holding a trial." Chiesa, Derecho

procesal penal, Vol. III, Sec. 22.1 (In print).

The preliminary hearing clearly constitutes a judicial sieve "that serves the purpose of impeding frivolous and insubstantial accusations that overload the work of the Superior Court . . . Said hearing, therefore, is not a mere formality, but a judicial act of a defined outline in the procedural course, of indisputable importance, since the outcome will be reflected in the independence of the process." Hernandez Ortega v. Tribunal Superior, 102 D.P.R. 765, 771 (1974) (Concurrent opinion of Mr. Associate Justice Diaz Cruz).

To achieve said goal, the rule provides that the accused will have the right to be represented by an attorney,

to cross-examine the prosecution witnesses, to present evidence on his behalf and obtain the sworn statements of the witnesses that the prosecutor has had testify at the hearing. Furthermore, he will be able to present the affirmative defense of insanity or alibi. Hernandez Ortega v. Tribunal Superior, supra.

The prosecutor, on his part, can be present at the hearing and confront the evidence presented by the accused. He will not have to present, though, all the evidence he has available since for the determination of cause in a preliminary hearing, the probatory standard is different from the one required in the trial to obtain a conviction. Nevertheless, he will have to present

evidence of each and every one of the elements of the offense imputed.[3]

On the other hand, "unlike other jurisdictions in which the preliminary hearing is a record hearing, in Puerto Rico the practice is that it is held in a small courtroom or in the judge's chambers, without being taped mechanically or the incidents being perpetuated by shorthand or stenotype. The witnesses are excluded from the hearing before and after testifying. Except for these officials, nobody else knows what happened at the hearing, since

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[3]The fact that in Rodriguez Aponte, supra, we pointed out that the preliminary hearing is not a "mini-trial," does not mean that it does not have many of the characteristics which a trial, in fact, has. The mere statement in Rodriguez Aponte does not adulterate the eminently judicial nature of the preliminary hearing.

it is held literally behind closed doors and without a record." Sanchez Martinez, La vista preliminar: publica o privada, Forum, Year 7, No. 2, page 9 (1991).

Once he has the evidence before him, the judge determines if such evidence establishes all the elements of the offense and if the probability exists that the accused has committed it. If the Court is not convinced that all the elements of the offense are present and that it is possible that the accused has committed it, he should make a determination of no cause.

From the above it is inferred that the preliminary hearing is a very important stage in our criminal procedure code: "Although the central object of the preliminary hearing is not adjudged

on the merits of the innocence or guilt of the accused," Rodriguez Aponte, supra, p. 665, "[in] its objective, said hearing is judicial [and] so should be the essence of its procedure." Pueblo v. Opio Opio, 104 D.P.R. 165 (1975). (Supplied emphasis). Rodriguez Aponte, supra.[4] The hearing is geared to protect the accused through a filter or judicial sieve through which the state has to pass evidence and prove if it is justified or not to intervene with a citizen's freedom

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[4]In Rodriguez Aponte, moreover, we specifically expressed in relation to the preliminary hearing, "although it is a matter of a properly judicial function, it is not a mini-trial." p. 665 (Supplied emphasis).

Although in Puerto Rico said institution exists in the texts, it has not been used for various decades. It is regulated by Law No. 58 of June 18, 1919, as amended, 34 L.P.R.A. Sec. 521, et seq.

and subject him to the severity and hazards of a plenary trial." Id., 665. Due to its importance in criminal procedural law, our code recognizes that at that stage the accused has all guarantees described before, which are similar to the ones he has in a trial.

Therefore, it is difficult to understand the interpretation that the majority makes today to the effect that the preliminary hearing is a "simple procedural mechanism" and that it fulfills "an investigative judicial function." To use this qualifier to describe the purposes of the preliminary hearing of Puerto Rico would be making it equal to the Anglo-American institution of the grand jury or to the Italian

magistrates. Such statement is untenable.

The grand jury is an institution profoundly rooted in the North American tradition. Its only similarity to the preliminary hearing is that it fulfills the function of preliminarily investigating as to the perpetration of an offense, in order to determine afterwards if the accused should be submitted to the rigors of a plenary judicial proceeding. Hurtado v. California, 110 U.S. 516 (1884); Branzburg v. Hayes, 408 U.S. 665 (1972).

Its dissimilarities as to the preliminary hearing are evident, since it is, in the first place, an ex parte, non-adversative procedure. U.S. v. Calandra, 414 U.S. 338 (1974). It is characterized

by its secretiveness, and once constituted, the grand jury has independent investigative powers and may summon witnesses. The person being investigated does not have the right to be present, nor to cross-examine witnesses or to present his own witnesses. He neither has the right to be represented by an attorney. Finally, the secretiveness of the grand jury is not for the benefit of the suspect, since that person does not have the right to request that the procedure be open. In other words, it is a procedure in which the suspect does not have the same constitutional rights which he has in the

preliminary hearing or the trial. U.S. v. Mandujano, 425 U.S. 564 (1975).[5]

The preliminary hearing situation is completely different. As the rule that rules it clearly provides, and its interpretative jurisprudence, a large part of the constitutional rights that protect an accused during the trial also protect him during the preliminary hearing. This statement is so true that, in Pueblo v. Opio Opio, supra, we resolved that the terms of a speedy trial established by the constitution for the holding of the plenary hearing, on its

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[5]The Supreme Court of the United States resolved, specifically in Mondujano, that in the grand jury proceeding the accused does not have the right to be assisted by an attorney. It has been recognized, nevertheless, that this right does assist the accused during the holding of a preliminary hearing.

merits, are applicable to the preliminary hearing proceedings. In so resolving, we left established that:

> The right to a speedy trial does not circumscribe itself to the act of the trial as such; it extends to comprise all the stages in a gradual progression from the initial imputation of the offense . . . In terms of every human being's fundamental right to feel free from the oppression and tormenting worry which an unjust accusation generates, there is no significant difference between the delay in submitting the accusation to the purifying crucible of the preliminary hearing, and the delay in holding the trial for the final decision, guilt or innocence. p. 169.

As in the United States, Walker, supra, in the preliminary hearing in Puerto Rico a great number of criminal cases are finally disposed of. For many persons it turns out to be the last

proceedings in their criminal prosecution.[6]

Therefore, under the protection of the rights consecrated by the Constitution of the Commonwealth of Puerto Rico as well as by the United States Constitution, ordinarily, the public should have access to the preliminary hearing. Only under exceptional circumstances should the Court close the preliminary hearing. In these cases the Court should make

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[6]In fact, as it emerges from the Annual Report of the Judicial Branch, towards the years 1989 and 1990, 29 percent of the preliminary hearings resolved represented the last contact of the accused with the criminal justice system.

In the years 1989-1990 in Puerto Rico 33,780 preliminary hearings were resolved. Of that total, 6,010 ended because of no probable cause and 3,797 were dismissed.

determinations that closure is justified to preserve values of great community importance and that the decision be narrowly tailored to serve those interests. Press-Enterprise II, supra, pp. 13-14. See also, Chiesa, supra, Vol. III, Sec. 22.4(C) (In print). For these reasons we vigorously dissent from the majority opinion. Under the standard previously expressed, Rule 23(c) of Criminal Procedure is unconstitutional.

IV.

Notwithstanding the aforementioned, the Court's opinion reverses the scheme of federal constitutional analysis when it does not review the validity of the mandatory closure of the preliminary hearings and when it demands, from

whomever pretends their openness, to demonstrate that the accused has waived his right that the proceeding be private or that circumstances exist which show that the right whose protection is attempted, is not present. According to what this court is resolving today, an anomaly arises in that the person claiming a right of access will have to show special circumstances.

This situation is aggravated by the fact that the majority's opinion is totally lacking of criteria or guidelines to assist the courts in the determination of when are present the exceptions which justify openness over the opposition of the accused. By considering only the differences between our preliminary hearing and that of California in the

process of deciding if the Press-Enterprise II applies in Puerto Rico, the Court omits an essential part of the constitutional analysis on the First and Fourteenth Amendments.

Even considering that a meticulous examination of what differentiates our preliminary hearing from the preliminary hearing of California is necessary, we are not convinced that such differences are so substantial as to justify the rejection of the Press-Enterprise II federal case.

The majority's position is based on the premise that in Puerto Rico the preliminary hearing "is performed during the judicial investigative stage." The fallacy of this position is evident. In our code of criminal procedural, the

function of the courts is adjudicative and not investigative. To whom the function corresponds, of investigating the criminal acts, is the Office of the prosecutor. The preliminary hearing offers an opportunity to the prosecutor to demonstrate to the court that probable cause exists to believe that an offense has been committed and that the person before the judge committed it. When making its determination the Court "finds itself between the parties not as an interested party but as a judge. In its objective and function, said hearing is judicial. So must be the essence of its procedure." Wright, Federal Practice and Procedure, 2nd Ed., Vol. 1, p. 181 (1982).

On the other hand, the majority's opinion assumes that in California the arraignment required by Rule 859(b) of the Penal Code, West's Annotated California Codes (1985), turns the accused into a defendant. Even though in California, statutorily, this arraignment is required at the beginning of the hearing, this really does not mean that the proceeding's objective is different than from Puerto Rico's. In both jurisdictions its only purpose is the determination of probable cause to submit the accused to trial. See, for comparative purposes, Bunis v. Superior Court of Tulare County, (1974), 117 Cal. Rptr. 898, 43 C.A. 3d. 530; and Pueblo v. Rodriquez Aponte, supra. In this sense, the difference pointed out between both

jurisdictions by the majority's opinion is one of a semantic nature, and not conceptual.[7]

The opinion of the Court is also based on the thesis that in Puerto Rico it has not been resolved whether the rules of evidence apply to this proceeding, and that in California, on the contrary, they do apply. According to the majority, this lack of application of the evidentiary code to the preliminary hearing has as a consequence that the public, the potential members of the jury and the press, become contaminated at this stage with evidence

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[7] As a matter of fact, in Press-Enterprise II, the federal Supreme Court made it clear that when Mr. Roberto Diaz requested that the preliminary hearing be closed, what the municipal court of California was considering was a complaint, and not an accusation.

that would be inadmissible afterwards in a plenary trial. They are wrong.

Even though it is true that the evidence rules apply to the preliminary hearings of California, some provisions are inapplicable. On June 5, 1990, the Constitution of the State of California, as well as the procedural part of its penal code, were amended to permit the admission of hearsay evidence. Since 1990 Article I, Section 30(b), provides that:

> In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process.

Section 872 of the Penal Code of California provides, on its part, that:

> Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings.

Through the approval of both amendments a specific exception for the preliminary hearing was created in California. This is, that in order to protect victims and witnesses, the magistrate shall be able to base his determination on hearsay evidence even though it, on the day of the plenary trial, be inadmissible for not being

within the exceptions of the probatory code.[8]

Because hearsay evidence is admissible in the preliminary hearing in California, it does not have the asepsis that the majority's opinion purports to grant to it. Neither does it create an abysmal difference between California's preliminary hearing and Puerto Rico's that justifies the non-application of Press-Enterprise II. In the light of the thesis of the majority, upon the lack of the protection of the totality of the evidentiary code, and being the preliminary hearing public, in California

[8] In California it has been resolved that these amendments do not violate the right of the accused to a confrontation protected by the Sixth Amendment of the Federal Constitution. Montez v. Superior Court, 285 Cal. Rptr. 279 (1991).

also exists a possibility that the right of the accused to a fair and impartial trial be harmed. We cannot validate that interpretation.

The determination of probable cause in the preliminary hearing in Puerto Rico is done by a judge. Unlike the possible impairment that the excessive publicity might cause to the jurors in the trial, at the preliminary hearing it is a judge, with previous experience and knowledge of the law, who makes the decision. Because of his training and knowledge of the matter, the judge is qualified to make, impartially, the decision that is due according to the law, free of the influence of the journalistic information. The presence of the public and the press at the preliminary hearing

will not corrupt the adjudicative process. Besides, the courts, afterwards, will always be able to take the pertinent measures that are necessary to select an impartial jury, including removal to another courtroom and the continuance of the trial.

Under our laws, the application of the rules of evidence does not prevent that excessive publicity impair the right of an accused to a fair trial. In fact, "the publication of news about the judicial process does not constitute by itself a violation of the right to a fair and impartial trial." Pueblo v. Perez Santaliz, supra, p. 14. What guarantees that this does not occur are the measures adopted by the court to prevent that the jury become contaminated with

inflammatory or biased information that may pervert the adjudicative process. Pueblo v. Hernandez Mercado, supra.

The majority's thesis is also based on the theory that the private preliminary hearing protects the right of privacy of the accused. Its position ignores that, once the charges are pressed over a person, that information is public. Also public are the data related to the complainant and the date when the imputed offenses occurred. In fact, in the great majority of the cases this is the information which generates the initial publicity on the cases.

On the other hand, the majority's opinion sustains that "the privacy of the hearing is the most effective means that the prosecution possesses to protect the

right to the presumption of innocence, to a fair and impartial trial and to the privacy of a person in this "judicial investigative stage of the criminal proceedings." This sophistic reasoning emerges from the aprioristic premise that the presence of the public always impairs the right to privacy of the accused and his presumption of innocence.

Nevertheless, it does not take into consideration the intimidating effect which represents for the citizen a hearing from which the relatives of the accused are excluded. Besides, it ignores the mistrust generated by a proceeding which the accused and his relatives may not either attend.

Although the right to privacy has constitutional superiority, on occasions

we have recognized that it has to yield to other constitutional rights and compelling interests of the State: "The libelous cases essentially state the necessity to determine the respective weight of the interest in a duly informed citizenry, in promoting the vigorous debate over matters of public interest, on one hand, and the right to privacy on the other." Clavell v. El Vocero, 115 D.P.R. 685, 691 (1984). To resolve the tension between these rights of equal rank, we have used different methods applicable to the particular circumstances of each case. See Chiesa, supra, Sec. 6.8. Under this standard, it is justified that, instead of evaluating the private hearing, we recognize that the adjudication of this conflict must be

made case by case in the light of the different claims of the affected parties.

V.

On evaluating the constitutionality of a standard that compulsorily imposes the closure of a preliminary hearing and leaves in the hands of the accused the prerogative of its openness, we are conscious that it is imperative to balance various interests. They should be contraposed, in the first place, the constitutional right of access vis-a-vis the right of the accused to a fair and impartial trial. In doing this balancing, it is necessary to take into consideration that a presumption of openness exists, which can only be rebutted by showing the existence of a compelling state interest or of

extraordinary circumstances. We cannot lose sight that the accused has no constitutional right to the holding of the preliminary hearing in private. This right is a statutory one. See Sanchez Martinez, La vista preliminar: publica o privada?, supra.

The solution cannot be the total closure of the preliminary hearing proceedings, unless, upon the commencement thereof, the accused requests that it be public. This really represents an abdication of the court's responsibility to establish a balance of interests case by case. On the other hand, it would mean that, through legislation, it is declared that one right has higher hierarchy than the other:

> The authors of the Bill of Rights did not have the intention of establishing hierarchies among the rights of the First Amendment and those of the Sixth Amendment, assigning a higher rank to some above the others. In this case, the petitioners would like that we declare that the rights of the accused are subordinate to their right to publish in any circumstances. In the measure to which the creators of these guarantees, completely conscious of the potential conflicts that the same could generate, did not want or were not able to resolve by this matter giving priority to some guarantees over the others, it does not behoove us rewriting the Constitution in order to do what they refused to do. (Supplied emphasis). Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 561 (1976).

In all the prior occasions in which the federal Supreme Court, as well as this one, have faced the complex task of establishing this balance of interests, it has been done inclining the scale to give access to the public to the judicial

proceedings. Only under exceptional circumstances, restrictive measures have been taken, once these have been duly justified. Today we relinquish completely our precedents and allow a priori that the accused have the key to open or close the doors of the court.

Contrary to the standard stated before, the majority of this Court inclines the scale in favor of the closure of the preliminary hearing by applying it indiscriminately to all the cases, and only, in exceptional circumstances, allows the community to find out about what really goes on behind the closed doors of the courts. Its position emerges from the premise that the country should not be informed about what transpires at the judicial

proceedings and presumes that the presence of the press and the community necessarily will be contrary to the interests of the accused and of the community.

Finally, the conceptual structure and the grounds for the majority's opinion culminate, by elevating to constitutional rank, the privacy of the preliminary hearing provided by Rule 23, ignoring its statutory genesis and limiting the power of this court and of the Legislative Assembly to revise this scheme in order to open the doors and allow the press to inform the country about what transpires in the criminal cases. In view of the pronouncement of the Court's opinion, if the Legislative Assembly decides to make the preliminary

hearing public, it will have to perform a total revision of the proceedings, including the arraignment. The scope of its pronouncements is damaging to the separation of powers doctrine.

Let us remember that we live in a democratic system in which the people have a right to be informed and that this access guarantees that the citizens are properly prepared to make decisions that affect the community life. In the particular case of the Judicial Branch, the disclosure of what transpires in the judicial proceedings allows the public to know better the work performed by all the members of the system and assures that the proceedings be just and fair. Openness strengthens the people's confidence in the judicial branch and

guarantees the purity of the proceedings and the legality of our decisions:

> The comments and articles regarding the criminal justice system are the marrow of the values embodied in the First Amendment, in view that the function and the integrity of said system is of crucial importance for those citizens interested in the government's administration. The secretiveness regarding the judicial actions can only produce ignorance and mistrust of the courts and cast suspicions on the capacity for impartiality of the judges; the article, the critic and the free and vigorous debate can contribute to the public's understanding of the principles of law and to a better comprehension of the way in which the whole criminal justice system works, as well as to the improvement of the quality of said system by subjecting it to the purifying effects of disclosure and of a responsibility towards the public. Nebraska Press Ass'n v. Stuart, supra, p. 587. (Concurring opinion of Mr. Associate Judge Brennan).

For the reasons stated before, we dissent. We would declare

unconstitutional the part of Rule 23(c) of Criminal Procedure that closes the doors of the court when a preliminary hearing takes place. On our part, we would open the doors of the courts when preliminary hearings are held and would only allow a private session in the presence of a compelling social interest that could only be protected in such way.

(Signed)
Federico Hernandez Denton
Associate Justice

United States District Court
For the District of Puerto Rico

— CERTIFIED —

To be a correct translation prepared by

Nora I. Vargas

Certified Court Interpreter
Administrative Office of the
United States Courts

IN THE SUPREME COURT OF PUERTO RICO

El Vocero de P. R. (Caribbean Int. News Corp.) et al.

Appellants

v.

The Commonwealth of Puerto Rico et al.

Appellees

Dissenting opinion issued by Mr. Associate Justice Negrón García.

San Juan, Puerto Rico, July 8, 1992

I

The administration of justice is not the exclusive province of judges, attorneys and prosecutors. By means of the adequate functioning of the courts, an attempt is made to settle controversies and attain social peace.

As to the penal, constitutionally speaking, the concept of "public" trial

opposes that of "secret". It deals with a characteristic that operates in two dimensions: for the benefit of the accused and of society in general. Through it, it is guaranteed that the public see the accused prosecuted fairly, that the judge or the jury be aware of their high responsibility, and therefore, of the importance of fulfilling their functions sensibly and impartially, free of capriciousness and favoritism.

One of the present great dissatisfactions with the Puerto Rican system of justice is the cloak of secretiveness woven around the preliminary hearings in penal cases. Rule 23 of Criminal Procedure. No matter how good the qualities of the judicature, it is a matter of a situation in which what is hidden generates suspicion, encourages

misunderstandings and frustrates the people's expectations that judicial proceedings be public.

II

Under Art. II. Sec. 4, of our Bill of Rights, the "press", that is, all the mass social communication media-newspapers, radio, television and journals-constitutionally have a legitimate and particular interest in gaining access to them and in preserving their openness. "In the political sphere, the information media have been fittingly called 'the fourth branch of government', a name that describes the function of journalism as that of a faithful guardian and motivator of the other three branches. The media have power and influence in the social, political and economic spheres of society." L. Brown, Responsabilidad

social de la prensa, Mexico, Eds. Asociados, 1977, p. 9.

Even with all the imperfections of those communication media, in a democracy, publicity tends to guarantee afterwards, a constructive control over the work of the government, the administration of justice included; above all, it encourages its credibility. Soto v. Secretario de Justicia, 112 D.P.R. 477 (1982).

The medullar characteristic of modern journalism is its dynamism: news of the moment, instantly updated and processed by means of the radio, television, and in certain measure, the daily written press.

III

There is no evidence on which to base the thesis that opening the preliminary hearing is injurious per se or that it

will reflect negatively on the right of privacy of the accused; if that were so, how to explain that said Rule 23 visualizes that it be public at the request of the accused?

Let us not deceive ourselves; the preliminary hearing is not a sacred cow. Its "private" concept was simply the result of a vision with historical roots followed by this Court when it originally adopted Rule 23 in the warmth of the First Judicial Conference in the year 1958, subsequently validated by the Legislative Assembly when it put it into effect in 1963.

Remote in time, after almost three decades, the freedom of the press of yesterday cannot have the same content. The press of today, with its technical progress and fast international

intercommunications is not even a shadow of the one of those times. The appearance of other social communication media has totally revolutionized the expectations and responsibilities of the right of access and of information. Is it that now we are to encyst it and close it up forever inside a constitutional wall?

IV

The two main arguments expounded against openness of the preliminary hearing are that if the accused is acquitted, his right to privacy may be violated, and besides, if probable cause is found, the generation of excessive publicity that will negatively influence the jurors and affect his rights.

The weakness of both arguments is manifest. Be it private or open, holding

a preliminary hearing means that there has been previously a complaint and a warrant for arrest. Rule 6(a) of Criminal Procedure. It is a matter, then, of a situation in which the State has already intervened against a person accusing that person in court for an offense, and in order to subject it to its jurisdiction has restricted his freedom by means of a summons, bail or for lack of it, has ordered his pretrial imprisonment. The complaint presupposes a public judicial file, with the name of the accused, his address and other personal circumstances, and, besides, a summarized version of the facts constituting the offense. That complaint, as a public document, has always been accessible.

We cannot see, then, how it can be held that openness of the preliminary

hearing is a determining factor that affects the privacy of the accused. It is certainly a matter of degrees, to wit, a greater public exposure. In face of these circumstances, the dosis of risk in that public exposure, previously exists (sic) and will subsist. Experience shows that whatever the cases, and above all the notorious ones, are highlighted and commented in the press, and normally, are the subject of avid follow-up on the part of the people. Therefore, in our system of justice administration the guarantee that the members of the jury act impartially and with equanimity does not depend on proceeding secrecy, nor on ignorance, but on an intimate commitment with their consciences, and, it is clear, of course, on the instructions and the other cautionary measures that courts

traditionally adopt. Pueblo v. Miranda, res. on June 1, 1992; Pueblo v. Lebrón González, 113 D.P.R. 81, 86 (1982); Pueblo v. Tursi, 105 D.P.R. 717, 720 (1977).

In the face of this reality, which is more beneficial for the accused, the truthful account, a product of direct observation, or the inaccurate review, the hasty or imperfectly narrated comment, the result of speculation for being a secret proceeding? Surely, if the proceedings are kept in hiding, the news media shall never be able to give, nor we shall be able to demand from them, the most complete coverage and that they publish the most reliable and correct information.

V

Finally, even when the preliminary hearing is not a plenary trial, there

exist at the constitutional level, overwhelming grounds that demand its openness: to promote "faith in justice". It is known that after finding, on the merits, probable cause for an arrest for a felony, on many occasions the preliminary hearing- the original or on appeal- is the only and last forum wherein a criminal action is elucidated. Pueblo v. Cruz Justiniano, 116 D.P.R. 28, 30 (1984). In the absence of a compelling interest, our Constitution does not tolerate a judicial system that denies access to one of the most important and transcendental adjudicative dramas.

The active press "not only informs the news, criticizes and denounces, but also investigates it, participates and makes it". Oliveras v. Paniagua Diez, 115 D.P.R. 257, 265 (1984). Its social

function cannot be performed under official tutelage, although it be judicial and well-intentioned.

Only if the courts judge openly, their faces to the public, are we encouraging that every judgment that dismisses and ends a felony complaint-upon the non-existence of probable cause-enjoy greater credibility, that it be fair and correct: plainly and frankly, sunlight continues to be the best disinfectant.

(Sgd.) _____

ANTONIO S. NEGRON GARCIA

Associate Justice

United States District Court
For the District of Puerto Rico

— CERTIFIED —
To be a correct translation prepared by

Maria J. Vazquez

Certified Court Interpreter
Administrative Office of the
United States Courts

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THE COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

El Vocero de Puerto Rico et al.

v.

The Commonwealth of Puerto Rico et al.

Case AC-90-0181 Ori. Case: KAC89-1677

Civil Appeals
Civil Action or Offense

Marchand-Quintero, Juan R.
Box 4227
San Juan, P.R. 00902

NOTIFICATION

I HEREBY CERTIFY THAT CONCERNING THE MOTION OF RECONSIDERATION, THE COURT ISSUED THE ENCLOSED RESOLUTION

Hon. Attorney General San Juan, P.R. 00902
Portalatin Aguilar, Margarita - Dept. of Justice - Box 192, San J.
Mr. Chief Clerk Superior Court of San Juan
San Juan, Puerto Rico

San Juan, Puerto Rico, this 19th of August of 1992.

(Sgd.)
Francisco R. Agrait Lladó
Chief Clerk

(Illegible Initial)
Deputy Clerk

Certified Translation

IN THE SUPREME COURT OF PUERTO RICO

El Vocero de Puerto Rico
et al.

Plaintiff-Appellants

v. **No. AC-90-181**

The Commonwealth of Puerto Rico
et al.

Defendant-Appelles

RESOLUTION

In San Juan, Puerto Rico, August 17, 1992.

Having Heard the motion requesting the withholding of the mandate and after claiming the mandate on July 17 of 1992, nothing is to be provided.

The reconsideration brought by the appellant party is hereby denied.

It was so agreed by the Court and is hereby certified by the Chief Clerk. Associate Justices Negrón García, Rebollo

López and Hernández Denton would reconsider and hereby reiterate their previous opinion.

(Sgd.)

Francisco R. Agrait Lladó

Chief Clerk